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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 386

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY, PETITIONER,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1939.

CERTIORARI GRANTED NOVEMBER 6, 1939.

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 56189

In the Matter of THE ALBERT DICKINSON COMPANY, an Illinois Corporation

CREDITORS' PETITION UNDER SECTION 77B OF THE BANKRUPTCY ACT OF 1896 AS AMENDED AND SUPPLEMENTED—Filed June 13, 1934

To the Honorable Judges of the District Court:

The petition of Joseph W. Finnell, Noble D. Wolf, and F. M. Green, respectfully shows:

(1) That The Albert Dickinson Company is a corporation organized and existing under and by virtue of the laws of the State of Illinois, with its principal office in the City of Chicago and State of Illinois, where said corporation has had its principal place of business for upwards of the past six (6) months; that it is engaged in the business of dealing in seeds, grain and merchandise and conducting and operating storage warehouses.

(2) That your petitioners are creditors of the said The Albert Dickinson Company, a corporation, having provable claims against said debtor which amount in the aggregate in excess of the value of securities held by them to the sum of One Thousand Dollars ($1,000.00) and over. That the nature and amount of your petitioners' claims are as follows:

Joseph W. Finnell is the owner and holder of first mortgage and leasehold bonds executed by the debtor corporation, numbered 718 and 719, each in the principal sum of $1,000, totalling $2,000.00, together with interest at 6½% from June 1, 1934;

[fol. 2] Noble D. Wolf is the owner and holder of first mortgage and leasehold bonds executed by the debtor cor-

poration numbered 548 and 549, each in the principal sum of $1,000, totalling $2,000.00, together with interest at 6½% from June 1, 1934; and

F. M. Green is the owner and holder of first mortgage and leasehold bonds executed by said debtor corporation, numbered 399, 523, 772, 773, 774 each in the principal sum of $1,000; and 1787, 1788, 1789, 2267, 1923, 1678, 1870, each in the principal sum of $500.00, totalling $8,300.00, together with interest at 6½% from June 1, 1934;

that all of said bonds so owned and held by your petitioners are secured by a first trust deed against real estate owned in fee and by leasehold by the debtor located in the City of Chicago, County of Cook and State of Illinois; that although the total par value of said bonds is $12,500.00, the actual value of said first mortgage and leasehold bonds owned by your petitioners is substantially less than Ten Thousand Dollars ($10,000.00), and that your petitioners have provable claims against said debtor in excess of the sum of One Thousand Dollars ($1,000.00).

(3) That your petitioners are filing this petition under Section 77B of the Bankruptcy Act, approved July, 1896, as amended and supplemented, and that said debtor is a corporation which could become subject to the provisions of said Bankruptcy Act, and particularly the provisions of Section 77B thereof. That the debtor's assets and liabilities, according to its Balance Sheet purporting to be a true and correct statement of its financial condition as of January 31, 1934, are as follows:

[fol. 31] Assets

Cash		$13,258.03
Special deposit Central Republic Trust Co.		11,785.30
		25,043.33
South West Trust & Savings Bank	$5,453.81	
Less Reserve for bad debts	4,000.00	1,453.81
Accounts Receivable	58,300.61	
Less Reserve for bad debts	6,500.00	52,000.61
Travelers branches		806.42
Branch plants Idaho		311.16
Inter company accounts		18,409.05
Prepaid insurance, rent and other advances		21,890.56

Inventory:	
Seed and grain	134,757.31
Supplies	26,841.64
Transit	92.71
	279,606.60
Investments:	
Albert Dickinson Company, Treasury bonds	89,500.00
Albert Dickinson Company, Preferred	5,200.00
Plants:	
35th Street, Chicago	5,530,198.95
Minneapolis	180,954.34
Ord, Odebolt, Cisco & Branches	179,503.50
Autos and trucks	19,100.00
Brand and trade marks and good will	500,000.00
Bond issue expense	41,530.16
	$6,805,599.55

Liabilities

Bills payable sundry	26,000.00
Sanitary district	3,276.10
Hall Roberts (seed)	1,507.34
Letters of credit payable	4,302.90
Accounts payable	31,748.06
Accounts payable bags	5,274.05
Inter company accounts	23,320.87
Reserve for taxes and interest due	75,576.90
Reserve for taxes not levied and sundry deferred accts.	145,405.01
	$318,411.23
1st mortgage	1,978,500.00
Sanitary District	3,071.34
Greenebaum Sons Investment Co., notes	20,000.00
Dickinson Company notes	328,000.00
Reserve for depreciation	613,880.88
Capital stock preferred	949,000.00
Capital stock common	2,132,800.00
Surplus	461,936.30
	$6,805,599.55

[fol. 4] (4) That the debtor's authorized capital stock is as follows:

(a) 60,000 shares of no par value stock of which 17,000 shares consist of preferred stock and 43,000 shares of common stock.

(5) That petitioners further state that the general taxes levied for the year 1931 against certain real estate owned by said debtor in the sum of Thirty-eight Thousand, two hundred one and 32/100 Dollars ($38,201.32) are unpaid and in default with penalties accumulated thereon of Fifteen per cent (15%) on the first installment and Ten per cent (10%) on the second installment; that said debtor is in further default of additional general taxes for the year 1931, levied and assessed against other of said debtor's real estate in the sum of Three Thousand Two Hundred Fifty-one and 16/100 Dollars ($3,251.16), together with accumulated penalties of Fifteen per cent (15%) on the first installment and Ten per cent (10%) on the second installment, which taxes are now past due and in default. That the general taxes for the year of 1932 in excess of Thirty Thousand Dollars ($30,000.00) have been levied and assessed against said property and are now due and payable but are unpaid and in default; that in addition to the above default in taxes as above set forth the major portion of the sum of $20,000.00 and accrued interest, as shown on said balance sheet set forth in Paragraph 3, being due to Greenebaum Sons Investment Company, is now past due and in default.

(6) That as shown by the above statement of assets and liabilities, debtor has an insufficient amount of quick assets with which to meet its existing liabilities; that it has a large [fol. 5] funded indebtedness aggregating $1,978,500.00, and that a large amount of taxes are now due and about to accrue upon the property of said debtor; that there are unsecured creditors whose claims are now due in an amount in excess of $20,000.00.

(7) That the debtor corporation is unable to meet its debts as they mature.

(8) That there is pending in the Circuit Court of Cook County, Illinois as case numbered 34C 3720 a Chancery proceeding for the dissolution of said debtor corporation and

for the appointment of a receiver; said Circuit Court has not appointed a receiver for said debtor corporation and no decree of dissolution has been entered in said proceedings.

(9) That said debtor, within four (4) months next preceding the date of the filing of this petition, committed an act of bankruptcy in that it did heretofore, to-wit, on February 16, 1934, convey, transfer and assign to the Dickinson Feed and Seed Company, a corporation recently organized under and by virtue of the laws of the State of Minnesota, all of its machinery, equipment and inventory located in what is known as its Minneapolis plant, which property was valued on the books of the debtor in excess of $160,000.00 but was transferred without consideration and not in the due course of business.

(10) That under date of June 4, 1934 said debtor corporation sent a letter to your petitioners and the other holders of its bonds in which said debtor stated, among other things: "It may be necessary in a short time to ask the co-operation of the bondholders in some readjustment of the Company's financial structure".

[fol. 6] (11) That the debtor has not filed a petition or an answer in this, or any other court under section 77B of the Bankruptcy Act as amended and supplemented, and that no other voluntary or involuntary proceeding in bankruptcy is pending under said Section 77B of the Bankruptcy Act.

(12) That there is need for relief under said Section 77B, in that the said debtor has a large and profitable business but is unable to meet the obligations of its funded indebtedness and capital structure, and that your petitioners are unable to obtain the relief in any other legal and equitable manner and unless this Honorable Court shall take jurisdiction of the subject matter of this petition and administer the assets of the debtor, irreparable damage and loss will result to your petitioners and others interested in the debtor corporation.

(13) That your petitioners propose that the debtor shall effect a reorganization as provided for in said section 77B, and will submit a plan therefor at such time as may be fixed by your Honorable Court.

(14) That this petition is filed in good faith and is not collusive or for the purpose of obtaining any preference or unproper advantage for any one creditor over any other; that this Honorable Court issue its injunction restraining all other creditors, stockholders, all parties in interest, from filing any suits, at law or in equity, or interfering in any manner with the business of said corporation pending final adjudication or reorganization under decree of this Court.

(15) That in accordance with the provisions of said Section 77B this petition has been duly executed by your petitioners.

[fol. 7] Wherefore, your petitioners pray that service of this petition with a subpoena, may be made upon The Albert Dickinson Company, a corporation, as provided by said Bankruptcy Act, as amended and supplemented; that the debtor be requested to file an answer to this petition within ten (10) days after the service of a copy of such petition upon it; that this petition be approved and that your Honorable Court proceed thereon, in accordance with the provisions of said Section 77B.

Noble D. Wolf, Joseph W. Finnell, F. M. Green, Petitioners; Melville, Samuels & Pretzel, Henry Blumberg, Leo L. Stone, Attorneys for Petitioners.

[fol. 8] *Duly sworn to by Noble D. Wolf et al. Jurat omitted in printing.*

———

Served this writ on the within named The Albert Dickinson Co., a corporation, by delivering a copy thereof to A. B. Dickinson, Vice President, an agent of said corporation this 23rd day of June, 1934.

The President of said Corporation not found in my District.

H. C. W. Laubenheimer, U. S. Marshal, by Henry Glaubke, Deputy.

Marshal's Fees, 1 Services $2.00, — Miles —. Total $2.00.

[File endorsement omitted.]

[fol. 9] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING LEAVE TO AMEND PETITION

Upon stipulation of the parties hereto, It Is Hereby Ordered that the petitioners herein be and they are given leave to amend their petition herein by striking therefrom Paragraph numbered (9) thereof.

Enter:

Barnes, Judge.

September 10, 1934.

[fol. 10] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO CREDITORS' PETITION—Filed Sept. 10, 1934

Joseph W. Finnell, Noble D. Wolf and F. M. Green, petitioners herein, hereby amend the petition heretofore filed herein by striking therefrom Paragraph numbered (9) of said petition.

Joseph W. Finnell, Noble D. Wolf and F. M. Green, Petitioners, by Melville, Samuels & Pretzel, Their Attorneys. Henry Blumberg & Leo L. Stone.

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE ALBERT DICKINSON COMPANY, ALLEGED DEBTOR, TO THE PETITION HEREIN AS AMENDED—Filed September 10, 1934

The Albert Dickinson Company, alleged Debtor, hereinafter referred to as the "Debtor", for answer to the petition herein as amended, says:

1. The Debtor admits the allegations of Paragraph 1 of the petition.

2. The Debtor admits that the petitioners are the owners respectively of the Debtor's bonds referred to in Paragraph 2 of the petition.

3. The Debtor admits that the amount of the provable claims against the Debtor evidenced by said securities exceeds the present value of said securities by more than One Thousand ($1,000.00) Dollars, although the Debtor is informed and believes, and therefore avers, that the actual value of the property mortgaged as security for said bonds is in excess of the total amount of the bond issue of which they are a part.

4. The Debtor admits that the balance sheet set forth in Paragraph 3 of said petition is a substantial copy of the balance sheet of the Debtor setting forth its financial condition as shown by its books as of January 31, 1934.

[fol. 12] 5. The Debtor admits that its authorized capital stock is as set forth in Paragraph 4 of the petition. Of said authorized capital stock nine thousand, four hundred ninety (9,490) shares of preferred stock without par value (entitled to preference on liquidation of $100.00 per share plus 6% cumulative dividends) and forty-two thousand, six hundred fifty-six (42,656) shares of common stock without par value are issued and outstanding.

6. The Debtor admits that it is in default in payment of taxes levied upon its property for the years 1931 and 1932 substantially as set forth in the petition and in the payment of certain obligations to Greenebaum Sons Investment Company, and that it is at present unable to meet its debts as they mature.

7. The Debtor admits that there is pending in the Circuit Court of Cook County, Illinois, a prior proceeding in equity receivership; that neither the Debtor nor anyone else, other than the petitioners herein, has filed a petition or answer in this or any other court under Section 77(b) of "An Act to Establish a Uniform System of Bankruptcy throughout the United States", approved July 1, 1898, and acts amendatory thereof and supplementary thereto (referred to herein and in the petition as the "Bankruptcy Act"); that there is need for relief under said Section 77(b); and that this Court has jurisdiction of the Debtor and its assets under said section.

8. The Debtor is in the business of buying, selling, storing, processing and otherwise dealing in seeds and in poul-

try and other animal feeds. This business has been carried on by the Debtor since its incorporation in 1886 and prior to that time, since 1855, by Albert Dickinson, who was one of the incorporators and the original principal stockholder [fol. 13] of the Debtor. The business is of great value and the intrinsic value of Debtor's assets far exceeds the amount of its liabilities. Owing, however, to the current depression, which has existed in agriculture for the past ten years and more, the income and working capital of the Debtor have become greatly depleted so that it is not possible for the Debtor to pay its fixed charges as they become due and payable.

9. It is to the best interests of the creditors and stockholders of the Debtor that a reorganization be effected under the supervision of the Court and to that end that this Court approve the petition as amended and the answer herein, and take jurisdiction pending such reorganization of the property and business of the Debtor. The Debtor proposes to effect such reorganization and joins in the prayer of the petition that this Court take such jurisdiction and proceed herein in accordance with the provisions of Section 77 (b) of the Bankruptcy Act.

10. The Debtor represents that pending reorganization, the Debtor's business can be most economically and efficiently carried on by the present management and that it is to the interests of the creditors and stockholders of the Debtor that the present management be continued in possession and control of the property and business of the Debtor until final approval of a reorganization plan, subject to the orders of this Court and as provided in said Section 77(b).

11. This answer is filed in good faith and is neither collusive nor for the purpose of obtaining any preference for any one creditor or any party in interest over any other creditor or other party in interest, or for any class of parties in interest over any other class of parties in interest, save as such classes are lawfully entitled to such preferences, if any.

The Albert Dickinson Company by A. B. Dickinson, President. Tenney, Harding, Sherman & Rogers, Attorneys for the Debtor.

[File endorsement omitted.]

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPROVING PETITION AND ANSWER, ETC.—Sept. 10, 1934

1934

On due consideration of the petition herein as amended of Joseph W. Finnell, Noble D. Wolf and F. M. Green, Petitioners, and the answer of The Albert Dickinson Company, the debtor herein, the Court finds:

(a) That it appears from said petition and answer that the debtor is an Illinois corporation having its principal place of business at Chicago, Illinois, in this district, and is a corporation which could become bankrupt under Section 4 of "an Act to establish a uniform system of bankruptcy throughout the United States," approved July 1, 1896, and acts amendatory thereof and supplementary thereto, (hereinafter referred to as the "Acts of Congress relating to Bankruptcy"), and the present operations of which do not exclude it under Section 77B of said Act, and that this Court has jurisdiction of the parties and the subject matter of this proceeding:

(b) That said petition states, and said answer admits, that petitioners are creditors of the debtor having provable claims against it amounting in the aggregate in excess of the value of the securities held by them, to $1,000. or over; [fol. 15] that the debtor had not prior to the filing of said petition filed a petition or answer under said Section 77B; that the debtor is unable to meet its debts as they mature; that a prior proceeding in equity receivership is pending against the debtor; and that petitioners propose that the debtor shall effect a reorganization.

(c) That said answer either by averment or by admission of the allegations of the petition, in addition to the facts heretofore referred to, sets forth the nature of the debtor's business; a brief description of its assets, liabilities, capital stock and financial condition; the nature of said prior proceeding in equity receivership and the name of the court in which it is pending; the facts showing the need for relief under said section; that although the intrinsic value of the assets of the debtor exceeds its liabilities, the debtor is un-

able to meet its debts as they mature; and that the debtor desires to effect a plan of reorganization;

(d) That it appears to the satisfaction of the court that said petition and said answer comply with said Section 77B, and that said petition and answer have been filed in good faith.

It is Therefore Ordered:

(1) Said petition and answer are hereby approved as properly filed under Section 77B of Chapter VIII of the Acts of Congress relating to Bankruptcy.

(2) The debtor hereby is temporarily continued in possession of its estate.

(3) The debtor is authorized to operate its business until the further order of this court and the debtor shall have all the title to and shall exercise, consistently with the provisions of said Section 77B, all the powers of a trustee appointed pursuant to said section, subject at all times to the control of this court and to such limitations, restrictions, terms and conditions as this court may from time to time impose and prescribe and, without limiting the generality of the foregoing, shall have full power and authority to do [fol. 16] all things necessary or convenient in the operation of said business and the maintenance and preservation of said estate; to employ, discharge and fix the compensation of all such managers, agents, accountants and employees, other than officers, it may deem necessary or advisable for the proper conduct of the business; to buy and sell merchandise and supplies; to render services for cash or on credit; and to enter into new contracts incidental to the normal and usual operation of the business; to purchase or otherwise acquire, for cash or on credit, such material, appliances, instruments, equipment, supplies and other property as may be necessary or advisable in connection with the administration of the estate of the debtor and the normal and usual operation of its business, and to keep said estate insured to such an extent as it may deem advisable; to vote or cause to be voted any and all stock owned by the debtor; to collect and receive all the rents, issues, income, tolls and profits and all outstanding accrued or accruing accounts, things in action and credits due or owing to the debtor and to hold and retain all moneys received to the end

that the same may be applied under this or the further orders of this court. Any information, schedules, statements, declarations, affidavits and other instruments or documents which may, pursuant to the provisions of said Section 77B of Chapter VIII of the Acts of Congress relating to bankruptcy be required of the debtor, and any and all petitions, applications, requests or other instruments or documents, which may be filed in this proceeding by the debtor, may be executed by the President or the Vice President and the Treasurer of the debtor, or any one of them, [fol. 17] or otherwise as the debtor may by proper corporate action determine, and any such instrument or document so executed shall be deemed to have been duly executed and filed by the debtor unless and until the lack of authority of the officer or officers so executing the same shall have been determined by this court.

(4) The debtor is authorized, in its discretion, from time to time until the further order of this court, to pay and discharge out of any funds now or hereafter coming into its hands and available for such purposes:

(a) all expenses and charges incurred in the operation of the business hereby authorized and in preserving and maintaining the estate of the debtor.

(b) all claims for accrued wages of agents, officers and employes for services rendered prior to the date of this order, but remaining unpaid at the date hereof, and all operating and administrative expense heretofore accrued and unpaid for materials furnished, goods sold or services rendered prior to the date of this order but remaining unpaid at the date hereof, to the end that the operation of the business of the debtor may not be interfered with or interrupted;

(c) all taxes and charges of the nature thereof, lawfully incurred in the operation of the business or imposed upon [fol. 18] said property so far as it may deem such payments necessary or advisable in connection with the preservation of its property and the operation of its business.

(5) The debtor shall be allowed until the 30th day of October, 1934 (unless the time shall be extended further by order of this court), within which to reject contracts and leases of the debtor executory in whole or in part. Each such rejection shall be indicated by notices to that

effect, in writing, served upon the other party or parties to such contracts and leases and filed of record in this proceeding, and the continued operation by the debtor under any of said contracts and/or leases, within said period allowed for disaffirmance as the same may from time to time be extended shall not be deemed to conclude the debtor in respect of said election or to constitute an election.

(6) Pending the further order of this court, the debtor is hereby authorized and empowered to institute, prosecute and defend, compromise, adjust, intervene in or become a party to such suits, actions, proceedings at law, in equity or in admiralty, including ancillary proceedings in any Court or Courts of the United States, as may in its judgment be necessary or expedient for the protection, maintenance and preservation of the property and assets of the debtor and the conduct of its business or the carrying out of the terms and provisions of this order, and likewise to defend, compromise and adjust, or otherwise dispose of, any and all claims, suits, actions and proceedings instituted against it and also to appear in and conduct the prosecution [fol. 19] or defense of any action, suit or proceeding, or to adjust or compromise any action, suit or proceeding now pending in any court by or against the debtor where such prosecution, defense or other disposition of such action, suit or proceeding will in its judgment be advisable or expedient for the protection of the property and assets of the debtor.

(7) The debtor shall close its present books of account as of the close of business on the 10th day of September, 1934, and shall open new books of account as of the opening of business on the 11th day of September, 1934, and cause to be kept therein due and proper accounts of the earnings, expenses, receipts and disbursements of the debtor hereunder and the debtor shall preserve proper vouchers for all payments made on account thereof, and shall deposit the moneys coming into its hands in such of the banks in which funds of the debtor are presently deposited as shall be selected by the debtor, or in such other bank or banks as shall be selected or approved by this court. The debtor may continue to make deposits in and draw checks on any of its commercial bank accounts, but any bank or other depositary upon which such checks are drawn shall not have any duty to ascertain that such checks are drawn for proper

purposes but may honor and pay all properly drawn checks in the same manner as before the filing of the petition herein and without other or further liability in connection therewith.

(8) In the event that the debtor is, at the hearing hereinafter ordered, continued in possession of its estate and authorized to continue the operation of its busines-, it shall, not later than the 30th day of November, 1934, file with the Clerk of this court a statement of the assets and liabilities of the debtor, as of the close of business on the date of this order, and at such time as this court may hereafter direct, file such statements of operations, schedules and submit such other information as may be required by said Section 77B or as this court may from time to time direct.

[fol. 20] (9) Until the further order of this court, and except in this proceeding, all creditors and stockholders and all persons claiming or acting by, through or under them, and all sheriffs and marshals and other officers, agents, attorneys, proctors, representatives, servants and employes, and all other persons, associations and corporations are hereby enjoined and restrained from instituting or prosecuting any action at law or suit or proceeding in equity or admiralty against the debtor in any court of law, or equity, or admiralty, or before any association, organization or arbitration by referee or umpire, or other court or tribunal, or otherwise, or from executing or issuing or causing the execution or issuance, or the issuing out of any court of any writ, process, summons, attachment, subpoena, replevin, execution or other proceeding for the purpose of impounding or taking possession of or interfering with any property owned by or in the possession of the debtor, or owned by the debtor and in the possession of any of its officers, agents, or employes, and all sheriffs, marshals and other officers and their deputies, representatives and servants, the creditors of the debtor and all other persons, associations and corporations are hereby enjoined and restrained from removing, transferring, disposing of or attempting in any way to remove, transfer or dispose of or in any way interfere with any property, assets, or effects in the possession of or owned by the debtor or in the possession of any of its officers, agents or employes, and from doing any act or thing whatsoever to interfere with the possession and management by the debtor of its property and assets or in any way to interefere with it in the discharge of its duties

[fol. 21] hereunder or to interfere in any manner, during the pendency of this proceeding, with the exclusive jurisdiction of this court over the debtor and its property.

(10) This court reserves the full right and jurisdiction to make, from time to time, such orders appointing a trustee or trustees of said debtor's estate with all the title and powers of a trustee appointed pursuant to Section 44 of the Acts of Congress relating to bankruptcy, including, if this court shall so order, the power to operate the business of said debtor, and the same powers as those exercised by an equity receiver to the extent consistent with said Section 77B; fixing the time within which any reorganization shall be proposed, accepted and confirmed; requiring the debtor or trustee or trustees if appointed, to file such schedules and submit such information as may be necessary to disclose the conduct of the debtor's affairs, and the fairness of any proposed plan fixing a reasonable time within which claims and interests of creditors and stockholders may be filed or evidenced and allowed; providing for the division of creditors and stockholders into classes according to the nature of their respective claims and interests; and, in general, such orders amplifying, extending, limiting or otherwise modifying this order as to this court may at any time seem proper.

(11) The debtor is authorized from time to time to apply to this court for such other directions and instructions as it deems necessary or advisable in the due performance of its duties hereunder, and the right is reserved to all persons who may become parties hereto to apply to this court for any other or further directions and instructions to the debtor.

[fol. 22] 11. The hearing on the question of whether the Court shall make permanent this order retaining the debtor in possession, or shall appoint a Trustee or Trustees of the debtor's estate, or enter such other and further order or orders amplifying, extending, limiting or otherwise modifying this order as to the court may seem proper, is hereby set for October 5, 1934, at ten o'clock A. M. Notice of such hearing shall be given to the creditors and stockholders of the debtor in such form and manner as may be provided by further order, of this court.

Enter:

John P. Barnes, Judge.

Dated: September 10, 1934.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONFIRMING PLAN OF REORGANIZATION—Feb. 23, 1938

Pursuant to previous orders of court this cause has come on to be heard upon the Plan of Reorganization filed herein February 23, 1935, as amended in accordance with the orders entered herein on and prior to May 14, 1935, (referred to herein as "the Original Plan") and on the changes and modifications in the Original Plan heretofore filed herein and attached to and incorporated in the order of this court entered herein on December 30, 1937, (the Original Plan and said changes and modifications being referred to collectively as the Amended and Modified Plan) and upon the Reports of Carl R. Chindblom, Special Master, filed herein on October 26, 1936, April 10, 1937 and February 4, 1938, respectively, and the documents transmitted by the Special Master with any of said reports, and upon objections to said Amended and Modified Plan and evidence and argument of counsel in support of said Plan and said objections. The Court, having read and considered said Amended and Modified Plan and said Reports and said other documents and having heard said evidence and argument of counsel, Finds, Adjudges and Decrees:

1. The provisions of the order entered May 14, 1935, and the provisions of said order entered December 30, 1937, with respect respectively to the mailing and publication of no-
[fol. 24] tice of the hearing on the Original Plan and of the hearing on said changes and modifications therein, and with respect respectively to the mailing of the Original Plan and of said changes and modifications to the creditors and stockholders of the Debtor, have been duly complied with. The hearing on the Original Plan was duly continued by orders of this court to December 30, 1937, upon which date and at such hearing on the Original Plan said changes and modifications were proposed by the Debtor, and by Percy Cowan, Edgar N. Greenebaum, Julian H. Levi, Walter A. Wade and S. S. Fuhrman constituting the Bondholders' Committee acting under and pursuant to a certain Deposit Agreement dated August 1, 1934, with respect to the First Mortgage bonds of the Debtor, and by Charles H. Albers, as Receiver of the Ridgely Farmers State Bank, as holder

of certain of said bonds. The hearing on the Original Plan and on said changes and modifications was duly continued to this date by orders of this court entered herein, and due and timely notice of this hearing has been given to all creditors and stockholders of the Debtor as required by the orders of this court herein and by Section 77B of "An Act to Establish a Uniform System of Bankruptcy throughout the United States" approved July 1, 1895, as amended, herein referred to as "the Bankruptcy Act".

2. This proceeding was instituted in good faith and was properly brought under the provisions of Section 77B of the Bankruptcy Act and all proceedings to date have been in uniformity therewith and with the law.

3. The Original Plan has been properly proposed herein by the Debtor and said changes and modifications therein have been properly proposed as aforesaid and again at this [fol. 25] hearing by the Debtor and said Bondholders' Committee and by said Charles H. Albers as Receiver of the Ridgely Farmers State Bank, a holder of certain bonds of the Debtor.

4. An order was entered herein on September 30, 1934, classifying claims of all creditors, stockholders and holders of any interest in the debtor and providing for the filing of all claims. Due notice of such classification and of the provisions of said order with respect to the filing of the claims has been given to all creditors and stockholders of the Debtor.

5. No objection has been filed to said classification by any of the creditors or stockholders of the Debtor and said classification is in accordance with their respective claims and interests.

6. The claims affected by the Amended and Modified Plan are all included in Classes 3, 5, 6 and 7 of said classification. Claims of all creditors and stockholders affected by the Amended and Modified Plan have been filed. A summary of such claims as allowed and the disposition of objections thereto and of the number of acceptances of the Amended and Modified Plan in each class of claims affected by the Amended and Modified Plan is as follows:

A. Class 3—First Mortgage Bonds

(a) Pursuant to order of this Court, Central Republic Trust Company as successor Trustee under the trust deed

securing Debtor's first mortgage bonds filed a claim on behalf of all the holders of said bonds. Said claim was for [fol. 26] $1,978,500 in principal amount of bonds, being the entire principal amount of said bonds issued and not theretofore retired. Said claim included bonds in the principal amount of $60,500 which was issued but held in the treasury of the Debtor unpledged and are to be cancelled under the Amended and Modified Plan. Said claim therefore should be reduced to $1,918,00- the aggregate principal amount of all first mortgage bonds of the Debtor outstanding, the holders of which are entitled to participate in the Plan.

(b) In addition to the claim of Central Republic Trust Company claims were filed as follows:

(i) By Greenebaum Sons Investment Company as Reorganization Depositary appointed by order of this Court on behalf of the owners of bonds in the principal amount of $652,000 deposited with said Reorganization Depositary. With said claim was filed a list of the depositors of said bonds and the amount deposited by each of them.

(ii) By Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and S. S. Fuhrman, as Bondholders' Committee under said Deposit Agreement dated August 1, 1934, on behalf of the owners of bonds in the principal amount of $606,000 deposited under said Deposit Agreement. With said claim was filed a list of the depositors of said bonds and of the amount deposited by each of them.

[fol. 27] (iii) By individual owners of bonds in the aggregate principal amount of $16,000 deposited with the Reorganization Depositary and also included in its claim as well as in the claim of Central Republic Trust Company.

(iv) By individual owners of bonds in the aggregate principal amount of $3,000 deposited under said Deposit Agreement dated August 1, 1934 and also included in the claim of said Bondholders' Committee as well as in the claim of Central Republic Trust Company.

(v) By individual owners of bonds not deposited either with the Reorganization Depositary or under said Deposit Agreement, in the aggregate principal amount of $38,000, also included in the claim of Central Republic Trust Company. None of the bonds included in these last-numbered claims was deposited with said claims with the exception

of bonds in the aggregate principal amount of $4,500 attached to and filed with the claim of Nicholas C. Hagen.

(c) The Debtor filed objections to all claims of individual bondholders referred to in Items (iii) (iv) and (v) above, on the ground of duplication and on the ground that inadequate proof of ownership accompanied the claims, and also filed objections to so much of the claim of Central Republic Trust Company as represented bonds for which other claims were filed.

(d) Since the claim of Central Republic Trust Company includes all bonds outstanding, and therefore includes all bonds for which separate claims were filed it is not neces-[fol. 28] sary to pass upon the merits of such separate claims. The claim of Central Republic Trust Company is allowed for bonds in the aggregate principal amount of $1,918,000, being all bonds outstanding which are to be replaced by new securities under the Amended and Modified Plan. It is unnecessary to determine the interest accrued on the bonds for which said claim is made since all bonds are treated uniformly under the Amended and Modified Plan with respect to interest due.

(e) To avoid duplication, all separate claims filed, including claims described in Items (i), (ii), (iii), (iv) and (v) above, are disallowed and Debtor's objections to the claims referred to in Items (iii), (iv) and (v) are sustained without prejudice, however, to the right of the respective owners of bonds upon whose behalf such separate claims were filed, upon showing of ownership of bonds upon which claims were filed, to receive in exchange therefor the new securities to be issued to Debtor's bondholders under the Amended and Modified Plan.

(f) It follows from the foregoing that claims in Class 3 have been filed and allowed for all members of said Class in the total principal amount of said claims, being $1,918,000. Acceptances in writing of the Amended and Modified Plan have been filed by the holders of claims in this Class in the total principal amount of $1,359,000 which is more than the required two-thirds majority of all claims in this Class.

[fol. 29] (g) Among said acceptances is the acceptance of Greenebaum Sons Investment Company as holder of a claim on Debtor's notes in the aggregate principal amount of

$29,000 and on bonds of the Debtor in the same principal amount held as collateral to said notes. In the Amended and Modified Plan it is provided that this claimant shall be treated as the owner of said $29,000 in principal amount of bonds held by it as collateral for Debtor's said notes—and upon the exchange of said bonds for the securities to be issued therefor under the Amended and Modified Plan (or the deposit of said securities with a depositary for exchange as the Court may direct) the indebtedness on the notes secured by said bonds will be cancelled and released. This claim is therefore included in claims under Class 3 of the Plan.

B. Class 5—Unsecured Creditors

(a) The only claims filed in Class 5 are:

(i) Claim for $4,662.41 by the Sanitary District of Chicago including $3,224.91 balance due on contract for construction of a dock for the Debtor and $1,437.50 for rental due on October 1, 1934, for rental on property leased by the Debtor. This claim was reduced by stipulation to $3,224.91 for rental and that sum has since been paid in cash by the Debtor as required under said lease. This claim is therefore extinguished.

(ii) A claim by The Dickinson Company on notes in the principal amount of $339,743.20 and accrued interest, being [fol. 30] notes of the Debtor for money advanced by the claimant. No objection was filed to said claim and it is allowed. The Dickinson Company has filed an acceptance in writing of said Amended and Modified Plan.

(b) It follows from the foregoing that all members of this Class have filed their acceptances in writing to the Amended and Modified Plan.

C. Class 6—Preferred Stockholders

A claim was filed by the Debtor for the holders of 9,490 shares of preferred stock of the Debtor, being all the preferred stock issued. This claim should be reduced by 52 shares issued and held in the Treasury of the Debtor which are to be cancelled under the Amended and Modified Plan. No objections were filed to said claims and it is allowed for 9,438 shares of Preferred Stock of the Debtor, the holders of which, on behalf of whom the claim was filed, being all

the members of this class. The holders of 8,117 shares of said preferred stock have filed written acceptances of the Amended and Modified Plan. Therefore, more than the required majority of the claims in this class have accepted the Amended and Modified Plan.

D. Class 7—Common Stockholders

A claim was filed by the Debtor for the holders of 42,656 shares of the common stock of the Debtor, being all the common stock issued and outstanding. No objection was filed to said claim and it is allowed for 42,656 shares of common stock of the Debtor, the holders of which, on behalf of whom [fol. 31] the claim was filed, being all the members of this class. The holders of 42,562 shares of said common stock have filed written acceptances of the Amended and Modified Plan. Therefore, more than the required majority of the claims in this Class have accepted the Amended and Modified Plan.

[fol. 32] 7. The court is satisfied, by reason of the number and amount of securities of the Debtor outstanding in the classes affected by the Amended and Modified Plan and the extent of the public dealing therein, that the preparation of a statement showing what, if any, claims in said classes have been purchased or transferred by those accepting the Amended and Modified Plan after the commencement or in contemplation of this proceeding and showing the circumstances of such purchase and transfer, is impractical and therefore finds that said statement need not be filed.

8. The Debtor has filed herein a verified statement in form and manner as required by the Judge setting forth that there are no contracts of the Debtor which are executory in whole or in part except certain contracts of sale of merchandise upon which delivery has not been completed made in the ordinary course of business of the Debtor, and setting forth that no unexpired leases have been rejected or surrendered.

9. The Amended and Modified Plan is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders of the Debtor and is feasible and complies with the provisions of sub-division (b) of said Section 77B and has been accepted in writing and such acceptance has been filed in this proceeding by or on behalf of creditors holding more than two-thirds in amount of each

class whose claims have been allowed and would be affected by said Amended and Modified Plan and by or on behalf of more than one-half of each class of the stockholders of the Debtor as required by the provisions of said Section 77B. All provisions of said Section 77B relating to said Amended and Modified Plan and the acceptance and confirmation thereof have been complied with to make the same effective [fol. 33] and binding upon the Debtor and all of the bondholders and creditors of the Debtor and all holders of any interest in the assets of the Debtor, whether or not their claims have been filed.

10. The offer of the Amended and Modified Plan and its acceptance are in good faith and have not been made or procured by any means or promises forbidden by the Bankruptcy Act.

11. All amounts to be paid by the Debtor or the corporation referred to in the Amended and Modified Plan as the New Operating Company for fees, services or expenses incident to the reorganization are to be subject to the approval of the judge and no amount for services or expenses shall be paid to any party except those which shall be approved by the judge.

12. The Debtor and the New Operating Company will be authorized by charters under "The Business Corporation Act of Illinois" and by applicable state and federal laws upon confirmation of the Amended and Modified Plan of Reorganization, to take all action necessary to carry out the Amended and Modified Plan of Reorganization.

13. The Debtor is not a utility subject to the jurisdiction of any regulatory commission or commissions or any regulatory authority or authorities created by the laws of any state or states and the provisions of sub-division (e) Clause (2) of Section 77B of the Bankruptcy Act do not apply.

14. Securities to be issued pursuant to said Amended and Modified Plan are to be issued to existing creditors and stockholders of the Debtor in the process of a bona fide reorganization of the Debtor under the supervision of this court in exchange for the claims of such creditors and stock- [fol. 34] holders. The said securities are therefore exempt from the provisions of the Federal Securities Act of 1933 approved May 27, 1933 as amended and the Illinois Act en-

titled "An Act Relating to the Sale or Other Disposition of Securities and Providing Penalties for the Violation Thereof and to Repeal Acts in Conflict Therewith", approved June 10, 1919, as amended.

15. No plan for the reorganization of the Debtor, which complies with the requirements of Section 77B of the Bankruptcy Act, has been proposed or presented in this court except the Amended and Modified Plan presented by the proponents thereof.

16. This Court has jurisdiction of the parties hereto and of the subject matter, all required notices have been given and the proceedings to date have been regular and comply in all respects with Section 77B of the Bankruptcy Act.

17. Sufficient information has been submitted to the Court to disclose the conduct of the Debtor's affairs and the fairness of the Amended and Modified Plan, and said information is sufficient in lieu of the schedules required by Section 7 of the Bankruptcy Act.

18. The Court has considered all objections to the Amended and Modified Plan and considers them without merit. The Amended and Modified Plan is confirmed in all respects and all objections filed or made thereto are overruled.

19. The Debtor and all parties herein are hereby authorized to take any and all steps and perform any and all acts necessary to consummate the Amended and Modified Plan and the orders of this Court relative thereto, all under the supervision and control of this Court. The Debtor shall [fol. 35] report in writing to this Court on or before March 12, 1938 on the acts and things done and performed in the execution of said Amended and Modified Plan of Reorganization.

20. No change or modification which is either material or adverse to the interest of any creditor or stockholder of the Debtor has been made by this order and the Amended and Modified Plan as provided for in this order complies with the provisions of Subdivision (b) of 77B of the Bankruptcy Act and has been accepted as required by the provisions of subdivision (e) Clause (1) and the provisions of subdivision (f) have been complied with in respect thereof.

21. The corporation to be formed under the Plan, referred to in said Plan and herein as the "New Operating Company" shall assume and agree to pay in full all taxes and other liabilities or debts due or to become due from the Debtor to the United States of America or any of its officers, agencies, or departments. Such liabilities shall have the same priority and preference over claims of the New Operating Company with respect to the assets thereof, as would lie against the assets of the Debtor, had these proceedings not intervened, and the United States of America, its officers, agencies or departments shall be granted the same remedies against the New Operating Company and its assets with regard to the collection of such liabilities as they had against the Debtor. All statutes of limitation upon the collection of such claims shall be suspended during the time these proceedings are pending and for such additional period of time as the collection of such claims or any part thereof shall be postponed. Subject to its approval the court shall retain jurisdiction over the assets to be transferred to the New Operating Company and over [fol. 36] the New Operating Company for the purpose of carrying out and giving effect to any and all provisions of the Plan and the decree confirming the same insofar as said Plan affects and applies to tax and other claims of the United States of America, its officers, agencies or departments.

22. Real estate taxes to be paid by the Debtor from assets remaining to it after the transfer of assets to the New Operating Company as provided in the Amended and Modified Plan and personal property taxes to be paid by the New Operating Company shall be in the amount as adjudicated to be due or otherwise to be ascertained in such manner as may be provided by future order in this proceeding.

23. The Court reserves jurisdiction herein to consider and pass upon claims for taxes and all other claims not affected by the Plan and leave is given to the Debtor and any creditor or stockholder of the Debtor to file objections to such claims on or before March 14, 1938. The Court further reserves jurisdiction to make such further orders as may hereafter be deemed necessary or proper in connection with the carrying out of the terms and provisions of said Amended and Modified Plan and of this order and terminating this cause.

24. All persons desiring compensation for services rendered or reimbursement for expenses incurred in connection with this proceeding and the Amended and Modified Plan are hereby ordered and directed to file with the Clerk of this Court, on or before March 12, 1938, their verified petitions for such allowances and this cause is hereby continued until March 14, 1938, at the hour of 10:00 o'clock A. M. before this Court, without further notice, for hearing on said petitions.

[fol. 37] 25. The Court hereby appoints Walter A. Wade, Herbert E. Hillebrecht and Orlo A. Montague as the trustees to act under the stock trust agreement provided for under the Plan.

26. The hearing on all matters pending in these proceedings and for the entry of a final decree shall be held on March 14, 1938, at 10:00 o'clock A. M. before this Court, and this cause is hereby continued to such date and time without further notice.

Enter:

Barnes, Judge.

Dated February 23, 1938.

Exceptions hereby taken to entry of this order.
Benjamin H. Miller, Attorney for Objectors, D. C. Glasser et al.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AMENDING ORDER CONFIRMING PLAN

The order confirming the plan of reorganization rendered February 23, 1938, is hereby amended by striking out the name of Orlo O. Montague in the paragraph numbered "25" thereof and substituting in the place and stead thereof the name of Benjamin Wham.

Barnes, Judge.

March 5, 1938.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING FEES AND DISBURSEMENTS

This Matter coming on to be heard on the application of the various parties in interest for the allowance of fees and disbursements, and the Court having read and examined the various applications and petitions filed, and having read and examined the testimony taken before the Special Master in connection with said applications, and having read and considered the Master's Report filed in connection with said applications and said testimony, and the Court having further heard the arguments of counsel, and being fully advised in the premises,

It is Hereby Ordered that:

(1) Messrs. Henry Blumberg, Leo S. Samuels and Leo S. Stone, attorneys for the petitioning creditors, are hereby allowed the sum of Three Thousand Dollars ($3,000.00) for services rendered, and One Hundred Thirty-Four Dollars and Forty-Eight Cents ($134.48) for disbursements.

(2) Messrs. Glenn, Real & Browning, Messrs. Rathje, Hinckley, Barnard & Kulp, and Mr. Norman C. Barry, as attorneys for certain creditors, are hereby allowed the sum of Ten Thousand Dollars ($10,000.00) for services rendered.

[fol. 40] (3) Messrs. Poppenhusen, Johnston, Thompson & Raymond, attorneys for the First Mortgage Bondholders' Committee, are hereby allowed the sum of Thirteen Thousand Dollars ($13,000.00) for services rendered and the sum of One Hundred Sixty-One Dollars and Ninety-Eight Cents ($161.98) for disbursements.

(4) Messrs. Edelson, Edelson & Wise, attorneys for certain creditors are hereby allowed the sum of Six Thousand Dollars ($6,000.00) for services rendered.

(5) Messrs. Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as members of a First Mortgage Bondholders' Committee, are hereby allowed the sum of Two Thousand Dollars ($2,000.00) for services rendered, and the sum of Nine Hundred Forty-Five Dollars and Eighty-Five Cents ($945.85) for disbursements.

(6) Mr. Rudolph G. Mueller, Secretary to the First Mortgage Bondholders' Committee, is hereby allowed the sum of Two Thousand Dollars ($2,000.00) for services rendered.

(7) Greenebaum Investment Company is hereby allowed the sum of Two Thousand Four Hundred Forty-Three Dollars and Seventy-Five Cents ($2,443.75) for services rendered as Depositary.

(8) Mr. Mayer Karasik is hereby allowed the sum of One Thousand Eight Hundred Sixteen Dollars and Ninety Cents ($1,816.90) for disbursements.

(9) Henry Fechheimer is hereby allowed the sum of Two [fol. 41] Hundred Ninety Dollars ($290.00) for services rendered, said sum to be in addition to the Seven Hundred Dollars ($700.00) already received from Mayer Karasik.

(10) Benjamin H. Miller, attorney for certain creditors, is hereby allowed the sum of Five Hundred Dollars ($500.00) for services rendered.

(11) Carl R. Chindblom, Special Master, is hereby allowed the sum of Two Hundred Seventy-Five Dollars ($275.00) for services rendered, and Twenty-Five Dollars ($25.00) for expenses.

(12) William J. Snyder, Court Reporter, is hereby allowed the sum of Three Hundred Eighty-Nine Dollars and Seventy-Five — ($389.75) for services rendered.

The Court Further Finds that the services and disbursements for which allowances are made are reasonably worth, and the usual and customary charge for such services and disbursements in this district are not less than, the sums allowed; and the Court Further Finds that the value to the estate involved in this proceeding, of the respective services and disbursements, for which allowances are herein made, is not in excess of the respective amounts allowed.

It is Further Ordered that no payments in excess of 75% of the amount allowed shall be made on account of the foregoing allowances for services until a final decree has been entered in this cause and the case closed.

Messrs. Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi hereby object and except to the entry of the foregoing Order.

Enter:

(Barnes), Judge.

Dated October 26, 1938.

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed Dec. 5, 1938

To the Clerk of the District Court of Said District:

Notice is hereby given that the Dickinson Industrial Site, Inc., successor to The Albert Dickinson Company, Debtor, by Wham & O'Brien and Winston, Strawn & Shaw, their attorneys, hereby appeals to the Circuit Court of Appeals for the United States Circuit Court of Appeals for the Seventh Circuit from an order of said District Court of October 26, 1938, in which said District Court fixed and allowed certain compensation to certain parties to the reorganization proceedings entered in this action.

Wham & O'Brien, Winston, Strawn & Shaw, Attorneys for Appellant, The Dickinson Industrial Site, Inc., successor to The Albert Dickinson Company.

[File endorsement omitted.]

[fols. 43-44] Bond on appeal for $250.00 approved and filed Dec. 23, 1938, omitted in printing.

[fol. 45] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE FOR RECORD—Filed Dec. 23, 1938

To the Clerk of the District Court:

You are hereby requested to prepare the Record in the above entitled cause in connection with the appeal allowed by the United States Circuit Court of Appeals for the Seventh Circuit (No. 6816) on December 13, 1938, to consist of the following:

(1) Creditors' petition filed June 13, 1934.
(2) Amended creditors' petition filed September 10, 1934.

(3) Answer of The Albert Dickinson Company, filed September 10, 1934.

(4) Plan of Reorganization filed February 23, 1935.

(5) Amended and Modified Plan of Reorganization filed December 30, 1937

(6) Decree confirming Plan entered February 23, 1938.

(7) Petition for fees filed by Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as members of the First Mortgage Bondholders' Committee, filed March 12, 1938.

(8) Transcript of hearing before Special Master Carl R. Chindblom, filed August 17, 1938.

(9) Memorandum of the Court filed October 24, 1938.

(10) Order allowing fees, entered October 26, 1938.

[fol. 46] (11) Statement of evidence, when approved.

(12) Notice of lodgment of statement of evidence and proof of service thereof.

(13) Praecipe for record and proof of service thereof.

You are requested and authorized to certify said Record to the United States Circuit Court of Appeals for the Seventh Circuit on or before January 12, 1939.

Samuel E. Hirsch, Julian H. Levi, Abraham Greenspahn, Attorneys for Appellants.

[File endorsement omitted]

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE—Filed December 23, 1938

To: Wham & O'Brien, 231 So. LaSalle St.; Winston, Strawn & Shaw, 38 So. Dearborn St., Attorneys for Dickinson Industrial Site, Inc.

Please take notice that we have today, December 23rd, 1938, filed with the Clerk of the District Court our Praecipe for Record in the above entitled cause to be certified on or before January 12, 1939, to the Circuit Court of Appeals in Case No. 6816, a copy of which Praecipe for Record is attached hereto and herewith served upon you.

Samuel E. Hirsch, Julian H. Levi, Abraham Greenspahn, Attorneys for Appellants.

Received a true and correct copy of Appellants' Praecipe for Record mentioned in the above and foregoing Proof of Service, this 23 day of December, A. D. 1938.

Winston, Strawn & Shaw, Wham & O'Brien.

[File endorsement omitted]

[fol. 48] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRAECIPE—Filed December 23, 1938

To the Clerk of the United States District Court for the Northern District of Illinois Eastern Division.

SIR:

Pursuant to the notice of appeal filed in the above entitled proceedings by The Dickinson Industrial Site, Inc., a corporation (formerly known as The Albert Dickinson Company), Debtor, on December 5, 1938, and Section 250 of "An Act to Establish a Uniform System of Bankruptcy Throughout the United States" approved July 1, 1898, as amended by "The Chandler Act" approved June 22, 1938, and effective September 22, 1938, you are hereby requested to authenticate and transmit to the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, Chicago, Illinois, the original papers filed in said proceedings, and, without limiting the generality of the foregoing, the following:

1. Every and all petitions for allowances of compensation and reimbursement for expenses.

2. Every and all answers or objections filed to such petitions for allowances of compensation and reimbursement for expenses.

[fol. 49] 3. Order of reference to Carl R. Chindblom, Esq., of the petitions for allowances of compensation and reimbursement for expenses.

4. Stenographic Report of hearings before Carl R. Chindblom, Esq., on such reference.

5. Any opinion of the District Court pertaining to the allowances of compensation and reimbursement for expenses.

6. Order of October 26, 1938, allowing compensation and reimbursement for expenses.

7. Notice of Appeal filed by The Dickinson Industrial Site, Inc., a corporation (formerly known as The Albert Dickinson Company), Debtor, on December 5, 1938.

8. Certificate of the Clerk of the District Court of the names of the parties to whom he mailed copies of the notice of appeal and the date of mailing.

9. Bond on appeal filed December 23, 1938.

10. This Praecipe and proof of service thereof.

11. Any order hereafter entered pertaining to said appeal or to the transmission of the original papers filed in said proceedings to the Clerk of the United States Court of Appeals for the Seventh Circuit.

12. Certificate of the Clerk of the District Court.

Dated at Chicago, Illinois, this 23 day of December, 1938.

Wham & O'Brien, Winston, Strawn & Shaw, Attorneys for The Dickinson Industrial Site, Inc., Appellant.

[File endorsement omitted]

[fol. 50] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE—Filed December 28, 1938

To:

Clerk of the District Court of the United States, for the Northern District of Illinois, Eastern Division, Federal Building, Chicago, Illinois.

Mr. Leo B. Samuels, 77 West Washington Street, Chicago, Illinois.

Messrs. Glenn, Real & Browning, 135 South La Salle Street, Chicago, Illinois.

Mr. Norman C. Berry, 77 West Washington Street, Chicago, Illinois.

Messrs. Edelson, Edelson & Wise, 100 North La Salle Street, Chicago, Illinois.

Mr. Edgar W. Greenebaum, c/o Greenebaum Investment Company, 11 South La Salle Street, Chicago, Illinois.

Mr. Julian H. Levi, 38 South Dearborn Street, Chicago, Illinois.

Mr. Mayer Karasik, Edelson, Edelson & Wise, 100 North La Salle Street, Chicago, Illinois.

Mr. Henry Blumberg, 1 North La Salle Street, Chicago, Illinois.

Mr. Leo S. Stone, 134 North La Salle Street, Chicago, Illinois.

Messrs. Ratje, Hinckley, Barnard & Kulp, 100 West Monroe Street, Chicago, Illinois.

Messrs. Poppenhusen, Johnston, Thompson & Raymond, 11 South La Salle Street, Chicago, Illinois.

Mr. Percy Cowan, c/o Greenebaum Investment Company, 11 South La Salle Street, Chicago, Illinois.

Mr. Walter A. Wade, 38 South Dearborn Street, Chicago, Illinois.

Mr. Rudolph G. Mueller, c/o Greenebaum Investment Company, 11 South La Salle Street, Chicago, Illinois.

Mr. Benjamin R. Miller 350 North Milwaukee Avenue, Libertyville, Illinois.

Please Take Notice that on the 23d day of December, 1938, we filed in the office of the Clerk of the District Court of the [fol. 51] United States, for the Northern District of Illinois, Eastern Division, a praecipe requesting said Clerk to authenticate and transmit to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit the original papers filed in the above-entitled proceedings, a true and correct copy of which is herewith served upon you.

Please Take Further Notice that on Wednesday, the 28th day of December, 1938, at the opening of Court in the forenoon, or as soon thereafter as counsel may be heard, we shall appear before the Hon. John P. Barnes, one of the Judges of said Court, or in his absence before such other Judge as may be sitting in his place and stead, and then and there ask the Court for the entry of an order directing said Clerk to comply with said praecipe, at which time and place you may appear if you see fit.

Wham & O'Brien, Winston, Strawn & Shaw, Attorneys for The Dickinson Industrial Site, Inc., Appellant.

STATE OF ILLINOIS,
County of Cook, ss:

Kay Eldridge, being duly sworn, on his oath deposes and says that he served the attached notice and copies of the

prsecipe therein referred to by enclosing copies of said notice and praecipe in envelopes addressed to the various persons at the addresses beneath their names in said notice with proper amount of postage stamps placed thereon and placing said envelopes so addressed and stamped in the United States mail chute in the First National Bank Building, Chicago, Illinois on December 23, 1938, at about the hour of 5:00 o'clock in the afternoon.

Kay Eldridge.

Subscribed and Sworn to before me this 28th day of December, A. D. 1938. Mae E. Burgess, Notary Public. (Seal.)

[File endorsement omitted.]

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DIRECTING TRANSMITTAL OF ORIGINAL PAPERS

This cause having come on to be heard on the motion of Wham & O'Brien and Winston, Strawn & Shaw, attorneys for The Dickinson Industrial Site, Inc., a corporation, (formerly known as The Albert Dickinson Company), Debtor, for an order directing the Clerk of this Court to authenticate and transmit to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, pursuant to the notice of appeal filed herein on December 5, 1938, by said The Dickinson Industrial Site, Inc., and Section 250 of "An Act to Establish a Uniform System of Bankruptcy Throughout the United States" approved July 1, 1898, as amended by "The Chandler Act" approved June 2, 1938, and effective September 22, 1938, on due notice, and the Court having heard the arguments of counsel, and being fully advised in the premises,

It Is Hereby Ordered that the Clerk of this Court shall forthwith arrange chronologically, authenticate and transmit to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit the original papers filed in these proceedings. To the entry of which order Glenn, Real

& Browning and Poppenhusen, Johnston, Thompson & Raymond object and except.

Enter:

Barnes, United States District Judge.

Dated: Chicago, Illinois, this 28th day of December, 1938.

[fol. 53] Clerk's Certificate of transmittal omitted in printing.

[fols. 54-55] [Caption omitted]

[fol. 56] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In the Matter of

THE ALBERT DICKINSON COMPANY, a Corporation, Debtor

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE and Julian H. Levi, as a Bondholders' Committee Acting under Deposit Agreement Dated August 1, 1934, Petitioners-Appellants,

vs.

THE DICKINSON INDUSTRIAL SITE, INC., and THE ALBERT DICKINSON COMPANY, Debtor, Respondents-Appellees

PETITION FOR LEAVE TO APPEAL—Filed Nov. 25, 1938.

To the Honorable Judges of the United States Circuit Court of Appeals, for the Seventh Circuit:

Now come Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as members of a First Mortgage Bondholders' Committee under Deposit Agreement dated August 1, 1934, by their attorneys, Poppenhusen, Johnston, Thompson & Raymond, and Wilhartz & Hirsch, and respectfully ask leave to appeal from an order entered in the District Court of the United States for the Northern District of Illinois, Eastern Division, on October 26, 1938, and show:

(1) The order which petitioners seek to appeal from is an order entered by the District Court on October 26, 1938,

[fol. 57] fixing the compensation of various parties and counsel in a proceeding for corporate reorganization pursuant to the provisions of Section 77B of Chapter 8 of the Bankruptcy Act of 1898. That order allowed aggregate compensation of some $40,000, but allowed to the First Mortgage Bondholders' Committee (the petitioners here) only $2,000 upon an application made by them for $20,000. A certified copy of the order of October 26, 1938, is attached to this petition as Exhibit "A", and made a part hereof.

(2) The relevant facts in connection with this application for leave to appeal naturally group themselves about several distinct subjects:

(a) The extent and nature of the Debtor's business, and the problems which had to be dealt with in a reorganization.

(b) The accomplishment of the Bondholders' Committee.

(c) The reasons given by the District Court with respect to the reduction in the compensation allowed to the Bondholders' Committee.

I

The business conducted by the Debtor was originated in 1854 by Albert Dickinson, and concerned itself with the processing and sale at wholesale of agricultural seeds, poultry and other animal foods and popcorn. The business was incorporated in 1887 as "The Albert Dickinson Company" and has been conducted on a national scale with sales made to customers all over the United States. Since 1915 the Debtor has occupied buildings erected on its own land at 35th Street and California Avenue, in Chicago. Its industrial site there is between 40 and 50 acres in extent, and [fol. 58] has excellent railway and water facilities, with direct connections to many railroads. One of the assets of the Debtor is a 99 year lease dated in 1915, from the Sanitary District of Chicago, covering 11½ acres of property immediately north of the property owned in fee. In addition to the Chicago property the Debtor maintains various county receiving stations. Prior to 1934 the Debtor had executed and sold a First Mortgage Bond issue on all of its fee and leasehold properties in Chicago which, at the time of reorganization, was outstanding in the amount of $1,978,500.

Due to economic conditions and changes in marketing conditions the Debtor's business suffered a severe decline.

The lack of adequate credit facilities and forced disposition of bank loans, deprived the Debtor of its working capital and as a result the Debtor defaulted in the payment of its First Mortgage Bonds and interest thereon. The Bondholders' Committee was organized on August 1, 1934, and called for the deposit of bonds and eventually came to represent approximately 70% of the outstanding bonds.

First attempts at reorganization were along the lines of converting the outstanding First Mortgage Bonds into a preferred stock, and securing new working capital through a new first mortgage loan on all of the real estate of the Debtor in amount of somewhere between $500,000 and $750,000. This culminated in a Plan of Reorganization filed on February 25, 1935, in the proceedings in the District Court. A copy of this Plan of Reorganization is attached to this petition as Exhibit "B".

This plan was later abandoned because of the inability of the Debtor to secure the required mortgage. In November [fol. 59] of 1937 the original Plan of Reorganization was modified in many important particulars. A copy of this Amended Plan of Reorganization, which was confirmed by the District Court, is attached to this petition as Exhibit "C". This Plan of Reorganization differs from the earlier plan in the following important particulars, among others:

(1) The Debtor yields up all of its interest in the real estate and buildings. The mechanics of this transaction are embodied in certain paragraphs of the Plan of Reorganization, as follows:

"1. The Debtor will retain the mortgaged real estate and transfer to a new operating company, in exchange for all the stock of that Company, all Debtor's other assets and business (except stock and bonds of the Debtor held in its treasury) subject to a $150,000 interest or charge thereon to be satisfied and discharged in cash as hereinafter provided.

"2. All the outstanding stock of the Debtor will then be turned into the Debtor's treasury in exchange for all the stock in the new operating company except the portion of the preferred stock of the new operating company which will be delivered in satisfaction of The Dickinson Company's claim as hereinafter provided. All the stock of the Debtor thus turned in—or stock trustees' certificates representing

the beneficial interest therein—will then be exchanged for Debtor's now outstanding bonds. Debtor's bondholders will thus become the sole beneficial owners of the corporation holding all the real estate now mortgaged to secure the bonds together with $150,000 out of the Debtor's other assets while the old stockholders and other creditors of the Debtor will no longer have any interest therein, but in lieu thereof will have the remaining assets and business,

"3. Appropriate changes in corporate names will be made so as to indicate that the Debtor corporation (then owned solely by the bondholders) is a real estate corporation and so as to permit the new operating company to carry on business under the name, 'The Albert Dickinson Company.' It is suggested that the new name of the Debtor, after all its stock passes to the bondholders, shall be 'Dick-[fol. 60] inson Industrial Site, Inc.' and it is thus referred to below."

(2) The Debtor's bondholders receive $150,000 from the current assets of the Debtor. This sum has actually been paid at this time.

(3) The Debtor then leases approximately 129,000 square feet of space at a rental of $24,600 a year to a new operating company. The Craver Dickinson Seed Company, which had never assumed any responsibility on any transactions carried on by the Debtor, joins in this lease as co-lessee. This co-lessee is a substantial company, with excellent financial responsibility.

Because of the fact that the Dickinson Company occupied at the time of the commencement of the proceedings practically all of the real estate pledged as security for the payment of the First Mortgage bonds, the difficulties of the Dickinson Company's business were intimately linked with any reorganization of the bondholders' position. This reorganization, therefore, was much more than an ordinary real estate reorganization, but in fact involved the readjustment of the affairs of a large industrial enterprise. The Debtor's gross sales in the year prior to the proceedings in bankruptcy amounted to in excess of $2,400,000. The Committee undertook a detailed and careful study of the problems of that business. Immediately after its organization, an investigation of the Dickinson Company was made by

an auditor employed by the Committee and later on in the proceedings, at the insistence of the Committee, the Trundle Engineering Company made an exhaustive examination of the operating policies of the Dickinson Company. The results of these activities were the discontinuance by the Debtor of operations in the feed industry which had proved unprofitable, as well as other corrections in its methods of operation.

[fol. 61] II

The Bondholders' Committee in this case is unique in that three of the members of that Committee directly represented large owners of first mortgage bonds of the Debtor. Mr. Walter Wade, a member of Winston, Strawn & Shaw, as Trustee of the Estate of Michael Espert, deceased, owned in excess of $57,000.00 of first mortgage bonds of the Debtor. Mr. S. S. Furman, who died prior to the presentation of the Amended Plan of Reorganization, owned in excess of $10,000 in first mortgage bonds of the Debtor. Mr. W. A. Hirsh, who was an original member of the Bondholders' Committee, represented himself and members of his family, who hold over $40,000 of First Mortgage Bonds of the Debtor. Upon Mr. Hirsh's death, he was succeeded by Mr. Julian Levi, a member of Wilhartz & Hirsch, representing the executor of the estate. None of these persons had any connection with the house of issue or the Dickinson Company.

The other two members of the Committee, Mr. Percy Cowan and Mr. Edgar Greenebaum, were officers of Greenebaum Sons Investment Company, the underwriter of the first mortgage issue. Mr. Cowan in addition personally represented the Rosenthal Estate, which owned approximately $50,000 of first mortgage bonds of the Debtor.

The Committee, because of the nature of the Debtor's affairs, which has been noted, was obliged to assume great responsibilities. This Committee in face-to-face negotiations with the Debtor arrived at the broad essentials of the Plan of Reorganization.

In addition, however, on November 11, 1937, as a result [fol. 62] of prior meetings between the Committee and the Debtor, important and valuable concessions were obtained by the Committee at a meeting attended by all of the members of the Committee and the senior executive officers of the Debtor. These concessions were:

(1) The obtaining by the Committee of the sum of $150,000 for the First Mortgage Bondholders, which sum has actually been collected and is now held for their benefit in the treasury of their company.

(2) The obtaining of the credit of the Craver Dickinson Seed Company, of Buffalo, as a co-lessee on the lease of the new operating company. The Craver Dickinson Seed Company is a corporation which has a net worth of over $100,000, and before this time had never assumed any responsibility with respect to the operations of the Dickinson Company in Chicago.

(3) The negotiation of a new lease covering 24,000 square feet of the Debtor's property to the new operating company and the Craver Dickinson Seed Company. The suggestion which had been made prior to this meeting of the Committee was that the new operating company occupy 322,000 square feet. The Committee succeeded in reducing this to 24,000 square feet and in having the new operating company assume the liability of removing the tanks and machinery from the remaining portion of the premises without cost to the Debtor, an enterprise which would have cost the Bondholders somewheres over $50,000. In addition to this advantage, the bondholders obtained additional space which can be and has been rented at rentals higher than that contemplated to be paid by the new operating company.

No one else in the proceedings can or does claim credit for these achievements, the importance and merit of which speak for themselves.

III

The District Court itself did not hear any of the evidence with respect to the applications for compensation made by the various parties. That testimony was heard before a [fol. 63] Master, who merely returned the transcript of the testimony taken, without comment. The District Court then, without further hearing, set the amount of compensation, and when questioned as to its reason for disallowing the Committee's claim for $20,000, and allowing only the sum of $2,000, stated that in his opinion in all 77B matters the lawyers did all the work and that accordingly he would not allow any compensation to the Committee beyond the sum of $2,000. A stenographic copy of the proceedings had

before the District Judge is attached to this petition as Exhibit "D".

Petitioners believe that a gr-evious error of law has been committed by the District Court in its allowance of but $2,000 to petitioners for their services in the reorganization of the Debtor. Petitioners believe that as a matter of law a Committee which performs services such as performed by these petitioners and set forth in paragraphs under II of this petition, is entitled to more than $2,000 in compensation; petitioners believe that any party to a reorganization proceeding who brings $150,000 in cash into the estate is entitled to compensation in excess of $2,000.

Wherefore petitioners pray that this Court may enter an order or orders herein in its discretion, granting leave to petitioners to appeal from the order entered in the District Court of the United States for the Northern District of Illinois on October 26, 1938, together with all other orders necessary to consummate and complete said appeal, and [fol. 64] that after hearing this Court enter an order reversing the order of the District Court entered on October 26, 1938.

Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Committee acting under Deposit Agreement dated August 1, 1934, by Percy Cowan, Its Duly Authorized Agent.

Duly sworn to by Percy Cowan. Jurat omitted in printing.

[fols. 65-66] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 25, 1938

Now come Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as members of a First Mortgage Bondholders' Committee under Deposit Agreement dated August 1, 1934, by their attorneys, Poppenhusen, Johnston, Thompson & Raymond, and Wilhartz & Hirsch, and assign errors in the entry of the order of October 26th,

1938, in the foregoing proceedings, which error is as follows:

(1) The District Court erred in allowing Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as members of a First Mortgage Bondholders' Committee, the sum of $2,000 for services rendered and disallowing the application made by them for $20,000 compensation for services rendered.

Poppenhusen, Johnston, Thompson & Raymond, Wilhartz & Hirsch, Attorneys for Appellants.

[fol. 67] In United States Circuit Court of Appeals for the Seventh Circuit

[Title omitted]

Notice—Filed November 26, 1938

To Tenney, Harding, Sherman & Rogers, 120 South LaSalle St., 1845; Dickinson Industrial Site, % Benjamin Wham, 231 South LaSalle St., 1745:

You and Each of You Are Hereby Notified that on November 25, 1938, Petitioners filed a petition for leave to appeal and assignment of errors, together with a brief in support thereof, as per copy of petition, assignment of errors and brief herewith served upon you.

Poppenhusen, Johnston, Thompson & Raymond, Wilhartz & Hirsch, Attorneys for Petitioners.

Received a copy of the above notice, together with a copy of the petition, assignment of errors and brief therein referred to, this 26th day of November, A. D. 1938.

Tenney, Harding, Sherman & Rogers, Dickinson Industrial Site, Inc., Benjamin Wham, M.

[fol. 68] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—December 13, 1938

It is ordered by the Court that the petition of Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as Members of a First Mortgage Bondholders' Committee under Deposit Agreement dated August 1, 1934, for leave to appeal from the Order or Decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered on October 26, 1938, in the matter of The Albert Dickinson Company, Debtor, be, and it is hereby granted, and an appeal from said Order or Decree is hereby allowed.

It is further ordered that appellants file an appeal bond in the sum of two hundred and fifty dollars within 10 days from this date.

[fol. 69] RECITAL AS TO BOND

And afterwards, to-wit: On the twenty-second day of December, 1938, there was filed in the office of the Clerk of this Court, an Appeal Bond, which said Appeal Bond is not copied here.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER APPROVING BOND—December 22, 1938

It is ordered that the Appeal Bond filed this day in this cause be, and it is hereby approved.

[fols. 70-71] Citation, in usual form, showing service on Wham & O'Brien et al., filed Dec. 28, 1938, omitted in printing.

[fols. 72-73] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

APPEARANCE—Filed Jan. 10, 1939

The Clerk will enter our Appearance as counsel for appellees.

Walter A. Wade, 38 So. Dearborn St., Benjamin Wham, 231 So. La Salle St., Chicago, Illinois.

[fol. 74] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

MOTION OF THE APPELLEE, THE DICKINSON INDUSTRIAL SITE, INC., FORMERLY THE ALBERT DICKINSON COMPANY, TO DISMISS THE APPEAL ALLOWED HEREIN ON DECEMBER 13, 1938—Filed Jan. 10, 1939

Now comes the Appellee, The Dickinson Industrial Site, Inc., formerly The Albert Dickinson Company, by Benjamin Wham and Walter A. Wade, its attorneys, and makes this, its motion to dismiss the appeal heretofore allowed by this Court to Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Protective Committee acting under deposit agreement dated August 1, [fol. 75] 1934, and states as the basis for its motion that this Court had no jurisdiction to allow said appeal. Attached hereto are the suggestions of the appellee in support of this motion.

Dickinson Industrial Site, Inc., by Walter A. Wade, Benjamin Wham, Its Attorneys. Walter A. Wade, Benjamin Wham, Attorneys for Dickinson Industrial Site, Inc.

[fol. 76] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER EXTENDING TIME, ETC.—January 10, 1939

It is ordered that the time to file a complete record on this appeal be, and it is hereby extended until the disposi-

tion of appellees' motion to dismiss said appeal, or until the further order of this Court.

It is further ordered that appellant's brief in opposition to said motion to dismiss be filed within five days from this date, appellees' reply to be filed within three days thereafter.

RECITAL AS TO BRIEFS

And afterwards, to-wit: On the sixteenth day of January, 1939, there was filed in the office of the Clerk of this Court, a Brief and Argument in Response to Motion to Dismiss, which said Brief and Argument is not copied here.

And afterwards, to-wit: On the twentieth day of January, 1939, there was filed in the office of the Clerk of this Court, Appellees' Reply to Appellant's Brief and Argument on Motion to Dismiss, which said Reply is not copied here.

[fols. 77-78] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER OF CONTINUANCE—January 20, 1939

It is ordered by the Court that the motion of appellees' to dismiss this appeal be, and it is hereby continued to the hearing of this cause on the merits.

[fols. 79-80] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

MOTION OF APPELLANTS FOR ORDER EXTENDING TIME WITHIN WHICH APPELLANTS ARE REQUIRED TO FILE THE RECORD HEREIN—Filed Jan. 27, 1939

Now come Appellants, Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Committee acting under Deposit Agreement dated August 1, 1934, and respectfully move the court to extend the time within which Appellants shall be permitted to file

the record until after the disposition of the motions pending in Case No. 6842, and in support of said motion Appellants desire to call the attention of this Court to the affidavit of Julian H. Levi, one of Appellants and of counsel in this cause, and to the Suggestions hereto attached.

Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Committee acting under Deposit Agreement dated August 1, 1934, Petitioners-Appellants, by Samuel E. Hirsch, Abraham Greenspahn, Julian H. Levi, Their Attorneys.

[fol. 81] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

MOTION TO CONSOLIDATE—Filed March 13, 1939

Now come The Dickinson Industrial Site, by their attorneys, Walter A. Wade and Benjamin Wham; and Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Committee acting under Deposit Agreement dated August 1, 1934, by their attorneys, Julian H. Levi, and respectfully move the court:

(a) That these causes be consolidated and heard upon one record;

(b) That the record in the consolidated causes consist of the following:

(1) Creditors' petition filed June 13, 1934;
(2) Amended creditors' petition filed September 10, 1934;
(3) Answer of The Albert Dickinson Company filed September 10, 1934;
[fol. 82] (4) Plan of Reorganization filed February 23, 1935;
(5) Amended and Modified Plan of Reorganization filed December 30, 1937;
(6) Decree confirming Plan entered February 23, 1938;
(7) All petitions for fees filed by various parties herein;
(8) Order of reference to Carl R. Chindblom, as Special Master;
(9) Transcript of hearing before Special Master Carl R. Chindblom, filed August 17, 1938;

(10) Memorandum of the Court filed October 24, 1938;

(11) Order allowing fees entered October 26, 1938;

(12) Statement of evidence when approved and filed;

(13) Notice of lodgment of statement of evidence and proof of service thereof;

(14) Praecipe for record and proofs of service thereof;

(15) Notice of appeal filed in the District Court on December 5, 1938;

(16) Certificate of Clerk of the District Court of names of parties to whom he mailed copies of the notice of appeal and the date of mailing;

(17) Bond on appeal filed December 23, 1938, by Dickinson Industrial Site, Inc.;

(18) Order of December 23, 1938, directing the Clerk to authenticate and transmit to the Circuit Court of Appeals the original papers;

(19) Certificate of Clerk of the District Court to the record;

(c) that a rule be entered in the consolidated causes upon all parties to show cause, if any they have, why the appeal should not be heard upon the portions of the record hereinbefore enumerated;

(d) that this Court determine that the appeal docketed as Cause No. 6842 or the consolidated causes shall be heard upon the original papers or on a printed record;

and in support of said motion tender to the Court the Suggestions attached hereto.

[fol. 83] This motion is made without prejudice to motions heretofore made to dismiss the respective appeals.

The Dickinson Industrial Site, by Walter A. Wade, Benjamin Wham, Its Attorneys. Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Committee acting under Deposit Agreement dated August 1, 1934, by Julian H. Levi, Its Attorney.

[fol. 84] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER SETTING CAUSE, ETC.—March 13, 1939

It is ordered that the record in this cause be not printed and that no briefs on the merits are required to be filed.

It is further ordered that this cause be set down for hearing on the merits and on all pending motions on Friday, April 14, 1939.

In United States Circuit Court of Appeals

[Title omitted]

Order Renewing Motion to Dismiss—April 14, 1939

It is ordered that the Motion of counsel for appellees' to Dismiss this appeal be, and it is hereby renewed and taken under advisement by the Court.

[fols. 85-86] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Motion to Dismiss—May 22, 1939

It is ordered by the Court that the Motion of Appellees' to Dismiss this Appeal be, and it is hereby denied.

[fol. 87] In United States Circuit Court of Appeals, October Term, 1938, April Session, 1939

No. 6816

In the Matter of The Albert Dickinson Company, a Corporation, Debtor.

Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Committee Acting under Deposit Agreement Dated August 1, 1934, Petitioners-Appellants,

vs.

The Dickinson Industrial Site, and The Albert Dickinson Company, Debtor, Respondents-Appellees

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

OPINION—Filed May 22, 1939

Before Evans, Sparks, and Kerner, Circuit Judges

EVANS, Circuit Judge:

This appeal is one of several taken from an order entered in the reorganization of the debtor, Albert Dickinson Co. In the order complained of the court fixed the compensation of attorneys and a bondholders' protective committee as follows:

Blumberg, Samuels and Stone, attorneys for petitioning creditors	$ 3,000
Glenn, Real & Browning, attorneys for $19,000 of bonds	$10,000
Poppenhusen, Johnston, Thompson & Raymond, attorneys for committee	$13,000
Edelson, Edelson & Wise, attorneys representing $20,000 of bonds	$ 6,000
Rudolph G. Mueller, Secretary to Committee	$ 2,000
Greenebaum Investment Co., depositary	$ 2,443.75
Mayer Karasik, for disbursements	$ 1,816.90
Henry Fechheimer	$ 290
Benjamin H. Miller, attorney for creditors	$ 500
Percy Cowan, Greenebaum, Wade and Levi, Members of the first mortgage bondholders' committee representing 70% of the bondholders	$ 2,000
Carl R. Chindblom, special master	$ 275
William J. Snyder, court reporter	$ 389.75

[fol. 88] The Appellee appealed from the allowances to all the aforesaid parties except the last three. The allowance to the firm of Glenn, Real & Browning, has been heretofore affirmed (Appeal No. 6842). The respondents—Karasik; Fechheimer and Miller; Poppenhusen, Johnston, Thompson & Raymond; Edelson, Edelson & Wise; Blumberg, Stone & Samuels—settled their differences while the appeal as to them was pending. Payments in full were made to Mueller, Secretary to the Committee, and Greenebaum Company, depositary. Of the several allowances of fees challenged there remains but one undisposed of, to-wit, the claim of the bondholders' protective committee, composed of Percy Cowan, Edgar N. Greenebaum, Walter A. Wade, and Julian H. Levi.

The District Court allowed this committee the sum of $2,000. It asked for and here contends that it should be allowed the sum of $20,000.

The Appellee argues that the appeal should be dismissed because not taken as the statute provides. It does not seriously dispute the asserted insufficiency of the allowance, but argues that there was not such abuse of discretion as to warrant our disturbing this award.

The Chandler Act was approved June 22, 1938, and became effective September 22, 1938. The petition for reorganization of debtor was approved September 10, 1934. The order from which this appeal was taken was entered October 26, 1938. The District Court never made any order declaring the Chandler Act applicable to these proceedings nor did this court. No application for such order was in fact made to either court.

Appellants, on November 25, 1938, and within thirty days from the entry of the order complained of, applied to this court for leave to appeal. We allowed the appeal. Appellee proceeded in the same way in appeal No. 6822. It applied to this court for leave to appeal from said order, on December 5, 1938. Its application was denied by this court.

As the law stood prior to the enactment of the Chandler amendment, it was well settled that an appeal from an order allowing compensation to attorneys and other parties entitled thereto in these reorganization cases rested with the Circuit Court of Appeals, which was required to exercise a discretion. Shulman v. Wilson-Sheridan Hotel Company, 301 U. S. 172.

[fol. 89] The committee's petition to appeal from the District Court's order of October 26, 1938, was granted by this court on December 13, 1938. Appellee contends that the appeal should have been perfected pursuant to Section 24a of the Chandler Act, which reads:

"The Circuit Courts of Appeals of the United States * * *, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: * * * Provided further, That when any order, decree, or judgment involves less than

$500, an appeal therefrom may be taken only upon allowance of the appellate court.

"(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

Section 250 of the Chandler Act reads:

"Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

Two other provisions of the Chandler Act are worthy of consideration:

Sec. 276c. "The provisions of section 77A and 77B of Chapter VIII * * * approved July 1, 1898, shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act, except that— * * *

(2) If the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this Chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable * * *."

Section 6 b provides:

"Except as otherwise provided in this amendatory Act, [fol. 90] the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect; but proceedings in cases then pending to which the provisions of this amendatory Act are not applicable shall be disposed of conformably to the provisions of said Act approved July 1, 1898 * * *."

Counsel are unable to agree what law applies. While the appellee followed the same practice as the appellants, it now argues that appellants' appeal should be dismissed.

Construing all of the aforesaid sections together with the Bankruptcy Act in force before the Chandler Act, we conclude:

(1) The provisions of the Chandler Act govern this appeal.

(2) Where the court has not had occasion to pass upon the practicability of applying subdivision (2) of section 276(c), said subdivision (2) should be ignored.

(3) Because "this amendatory Act" (The Chandler Act) elsewhere expressly covers the subject of appeal, section 6(b) does not govern.

(4) Section 250 of the Chandler Act, being a specific provision, applies to appeals from orders fixing compensation or disbursements to attorneys who render services. The maxim generalia specialibus non derogant controls.

(5) Appeals from an order making an allowance of compensation or reimbursement to those entitled thereto, or who make claim for such compensation and are refused it by the District Court, are allowed only in the discretion of the Circuit Court of Appeals.

(6) All other appeals from orders or decrees entered by the courts of bankruptcy, except from judgments involving less than $500, must be taken as other appeals in equity suits, namely, as provided for by section 73 of the Rules of Civil Procedure.

Applying these conclusions to the facts in the instant case, we conclude that the appellants properly sought the allowance of their appeal on this court.

The motion to dismiss the appeal must therefore be denied.

On the merits of the appeal we are confronted by a fact [fol. 91] question,—the legitimate range of judicial discretion.

The debtor is a company which for fifty years successfully conducted a large business in seeds. Its sales in a single year reached an aggregate of $15,000,000. Changes in method of distribution and the financial upset and business depression of the early '30s proved too much for it to withstand, and section 77B of the Bankruptcy Act, when that amendment was enacted, became a harbor into which it sailed for rest and repairs.

At the time its outstanding bonded indebtedness was $1,900,000, which was in default; it owed $300,000 in taxes; its real estate was appraised at $2,500,000.

A bondholders' protective committee was immediately created by holders of substantial amounts of bonds, to-wit, $60,000, $50,000, $40,000, and $10,000.* Mr. Greenebaum, a member of the house of issu· was the fifth member of the committee.

It and the debtor immediately gave attention to a plan of reorganization which was subsequently submitted to the security holders. It contemplated a loan of $750,000 from the R. F. C. It failed because debtor was unable to negotiate the loan on terms which it could meet.

The committee hired auditors and a management engineer and made every effort to submit a more feasible plan of reorganization, acceptable to debtor and security holders. Several attorneys, representing smaller bondholders, cooperated. The problem was complex and perplexing. There were fewer petty and captious objections to proposals than usual, although there were differences of opinion. Postponements and delays occurred. Much time was necessarily devoted by all to the problem of reorganization which presented as many business as legal questions.

Finally, a proposal which met with favor was submitted, was somewhat modified, and later approved by the security holders and the court. The new plan provided, among other things, for debtor's raising $150,000 from an outside source, a reduction in the amount of floor space used by it, and the leasing of the balance and the securing of said lease. These were the outstanding advantages of the plan for which all [fol. 92] parties claim credit, but of which we think it might be better said—all parties contributed in greater or less degree.

When the plan was finally approved, appellants represented 70% of the security holders, or more than $1,250,000 (par value) of the bonds. They assert that in this particular case the bondholders' committee was as active as the attorneys for the committee or as the attorneys for any other party; that their voice was more authoritative, because without their approval no plan could become effective; that they were the party most instrumental in bringing $150,000 of additional capital and the securing of a paying lease, which meant revenue in the future. On this committee were two able lawyers.

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* The par value of the bonds must not be confused with actual value.

We fully sympathize with the District Court in its effort to conserve the property for the creditors. To do this and at the same time do justice to those who render meritorious service in a reorganization of this kind is no easy task. Differences of opinion as to the nature and value of services among the participating attorneys are well nigh inevitable.

We fully agree the amount of securities represented by a group or an attorney should not be the sole, or even the determining, factor in fixing the amount of compensation. Nor would we, on the other hand, by any means ignore it when passing on fees asked in most cases. It may and often does help in appraising the good faith, as well as the value of the services.

Another disturbing factor, present in many cases, and not entirely absent here, is the apparent duplication of services for which compensation is sought.

Appellants concede that in making the allowances, the trial court exercised a discretion, and that discretion should not be disturbed unless improvidently exercised. In other words, to disapprove, we must find there has been an abuse of discretion.

What is judicial discretion? How is its abuse determined? At best, it is a somewhat relative term. No standard or measuring stick has been or can be devised that may be successfully applied in all cases. It and the words used to define it are somewhat elastic. In Newton v. Consolidated Gas Co., [fol. 93] 259 U. S. 101, 105, the Court spoke of it as follows:

"* * * Discretion within intendment of the rule is a judicial one; it does not extend to arbitrary and unreasonable action; and our review is limited to the question of its improvident exercise."

In the last analysis it comes down to a question of the extent of the difference between the trial court's or the fact trier's judgment and the judgment of the reviewing tribunal. In bankruptcy cases it may at times be measured by the difference between the judgments of a master or a referee and that of the District Court. (In the Matter of Edward S. Duvall, et al., decided April 28, 1939.)

It must be conceded by all that in matters where differences are not large, we must hold the District Court's judgment is supreme. But we are not much nearer the goal of our inquiry—for our study merely shifts to what are the limits of said range.

At times we can define a term best by illustrating what it is not. When the distance between the amount allowed and the amount claimed is so great that we can not reconcile them, and the good faith rendition of meritorious service is admitted, we have a case which calls for modification.

Somewhat similar questions arise in tort actions wherein excessive or inadequate damages are allowed by a jury. Refusal to disturb the verdict of a jury or the judgment of the trial court thereon, when the amount is either grossly excessive or grossly inadequate, because the amount of damages is for the jury to decide, is an avoidance of judicial responsibility. The rule is the same whether the case involves fees or awards in damage actions. The duty to act is as clear and as impelling in one case as in the other.

The reorganization of this debtor was for the benefit of its creditors. Its past history, its large real estate holding, its value as a going concern, and other property of value to it in the operation of its business, should be saved if possible. In short, the conservation of the property was essential to the protection of the bondholders.

In order that such a reorganization take place, it was necessary for the bondholders themselves, or for attorneys representing them, or both, to render certain services. That there is much false and foolish action of no benefit to the debtor estates and devoid of intelligence and good faith in [fol. 94] many cases brought under Section 77B, does not affect the rule that compensation is due and should be awarded to those who render services of merit. The heavy expense of a reorganization seems an unavoidable consequence of our doing business through large corporations where large sums of money are borrowed from investors who are not well informed as to the character of the security issued to them. But it was a condition that confronted these bondholders when the mortgagor defaulted in its interest payments, and they then learned that their mortgage bonds failed to fully measure up to their once-held beliefs,—a condition that demanded action. We can not too severely condemn the action of those who attempt to profit out of the investors' distress and their lack of experience.

The expenses of foreclosures, reorganizations, and receiverships, heavy, yet unavoidable in any case, have, in some instances, been multiplied by studied efforts to delay proceedings and prolong receiverships, by unnecessary duplications of services by many counsel, by frivolous ob-

jections made by bondholders' counsel in an effort to create nuisance value and by other methods familiar to those who have had intimate contacts with reorganization proceedings brought under the Bankruptcy Act.

Avoidance of this undesirable situation can only be successfully attained by the court announcing early in the proceedings that for duplications of services no compensation will be allowed. In fact, we see no way of avoiding embarrassment and trouble save by the court's informing some of the attorneys, committees, and other agencies that their services will not be paid out of funds in the court's possession. In the absence of such action, the questions of the total amount of fees and distribution of said fees among the many applicants will surely arise to perplex those who are responsible for the reorganization.

In the instant case we have no such embarrassing situation. All of the allowances were modest. The allowance to bondholders' committee is the only item of which we have doubt. It was disposed of by a well-nigh complete rejection because the court entertained the view that bondholders' committees are, generally speaking, useless instrumentalities that accomplish little or nothing or which do nothing of benefit to the reorganization. This may be true in many cases, but it does not necessarily constitute a universal practice. According to members of the committee, it was not [fol. 95] true in this case and the record supports this statement. It came into existence upon the urgent request of holders of sizable numbers of bonds. Others joined them until seventy per cent of the holders of the entire bond issue spoke through this committee. Two of its members were lawyers with experience in 77B proceedings. Had they merely sought to multiply fees, they could have appeared separately and represented individuals as other counsel in this case appeared for groups of smaller creditors. Their refusal to thus stultify themselves commends their present position to our favorable consideration.

Unless the court is justified in refusing the committee any compensation, the services rendered necessitated an allowance in excess of $2,000. To compensate each of four members representing bonds of the face value of $1,300,000 for three years' work, at a total of $500 each, seems grossly inadequate.

The range within which the trial judge's discretion has free and uncontrolled play must have outside limitations,—

below and above which it can not go. That this committee was entitled to some compensation is conceded. The fact that the court made it an allowance is proof the court so concluded. It, of course, should not be denied compensation on the theory that most committees are supernumeraries and of no value in the reorganization of the debtor, if in truth and fact it showed itself to be a serviceable agency working in good faith for those who were vitally interested in recovering the largest possible amount for the creditors.

We are not unmindful that a dominant rule governing the allowance of fees is the one which limits the total amount of all fees to what the enterprise can reasonably bear. Of course, this does not mean that the total allowance should be divided to the total exclusion of any deserving applicant who has rendered meritorious and valuable services, and another claimant rendering like services, benefited. Testing the allowances by this standard no fault can be found with the total allowances.

The allowance of $2,000 to the bondholders' committee, upon what is clearly shown to be the services by them rendered, is so much below the actual value of its services and the benefits which accrued to the debtor, that it amounts to an abuse of discretion. Comparing allowances to others [fol. 96] who appeared in the action and upon the showing of services rendered, we are convinced that the allowance should not have been less than $10,000. In designating $10,000, we are not fixing the actual value of that service, but stating a sum below which an allowance can not be allowed to stand.

In other words, the range within which the judicial discretion may operate has the sum of $10,000 for its minimum. As in the case of excessive verdicts, the appellate court fixes the amount above which a verdict or judgment will not be allowed to stand. So here we fix the minimum.

The decree is modified by an allowance of $10,000 to the bondholders' committee. As modified, it is affirmed, appellants to recover their costs.

A true Copy:

Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[fol. 97] IN UNITED STATES CIRCUIT COURT OF APPEALS

6816

In the Matter of THE ALBERT DICKINSON COMPANY, a Corporation, Debtor. Percy Cowan, Edgar N. Greenebaum, Walter A. Wade & Julian H. Levi, as a Bondholders' Committee Acting under Deposit Agreement dated August 1, 1934

vs.

THE DICKINSON INDUSTRIAL SITE and THE ALBERT DICKINSON COMPANY, Debtor

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Before: Hon. Evan A. Evans, Circuit Judge; Hon. William M. Sparks, Circuit Judge; Hon. Otto Kerner, Circuit Judge.

JUDGMENT—May 22, 1939

This cause came on to be heard on the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof: It is now here ordered, adjudged and decreed by this Court that the Order or Decree of the said District Court in this cause appealed from be, and the same is hereby modified by an allowance of $10,000.00 to the Bondholders' Committee, and as so modified the said Order or Decree of the said District Court, be, and the same is hereby affirmed.

It is further ordered that appellant's recover their costs.

[fols. 98-99] RECITAL AS TO PETITION FOR REHEARING, ETC.

And afterwards, to-wit: On the eighth day of June, 1939, there was filed in the office of the Clerk of this Court, a Petition for a Rehearing, which said Petition for a Rehearing is not copied here.

And afterwards, to-wit: On the seventeenth day of June, 1939, there was filed in the office of the Clerk of this Court, an Answer to Petition for Rehearing, which said Answer is not copied here.

[fol. 100] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OCTOBER TERM, 1938, APRIL SESSION, 1939

No. 6816

In the Matter of THE ALBERT DICKINSON COMPANY, a Corporation, Debtor

PERCY COWAN, EDGAR N. GREENBAUM, WALTER A. WADE and Julian H. Levi, as a Bondholders' Committee acting under Deposit Agreement dated August 1, 1934, Petitioners-Appellants,

vs.

THE DICKINSON INDUSTRIAL SITE, INC., Formerly the ALBERT DICKINSON COMPANY, Debtor, Respondent-Appellee

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division

Before Evans, Sparks, and Kerner, Circuit Judges

OPINION ON PETITION FOR REHEARING—Filed June 24, 1939

EVANS, Circuit Judge:

Appellee, on this rehearing, strenuously assails the correctness of that part of our opinion which holds that appeals from orders making provision for compensation of counsel are allowable only in the discretion of the Circuit Court of Appeals. Inasmuch as this pronouncement was for the purpose of settling the practice, we have given the matter further consideration.

The deference we owe to, and the respect we have for [fol. 101] the views of, the Second Circuit Court of Appeals, which reached a different conclusion in London v. O'Dougherty, 102 F. (2d) 524, have added to our anxieties.

In reaching our conclusion we were guided by what we believed to be the intention of Congress in enacting the bankruptcy legislation, namely, the desire to expeditiously administer the estates of insolvents. The more recent amendments to the general bankruptcy act, which for the purpose of convenience might be called the reorganization provisions as distinguished from the liquidation sections of

the old act, should be similarly construed. Expedition in the reorganization of a debtor is as essential for the protection of creditors as is expedition in liquidations under the old bankruptcy act.

One of the possible methods of delay is through appeals. While the right to apply for an appeal in bankruptcy cases may be as important as in other suits, experience has demonstrated that there is a possibility for the misuse of the said right of appeal where reorganization of a debtor with many creditors holding valuable assets is about to be effected. Such a situation affords unusual opportunities for one avariciously inclined to create a nuisance value for a claim otherwise lacking in merit.

In other words, appeals may tie up the liquidation of the estate or the reorganization of the debtor, although the amount involved is relatively small.

It seems, for this reason, Congress has, in the old act as well as in the amended act, guarded against abuse by providing that the right of appeal shall not be an absolute one but, in some cases, allowable only in the discretion of the court of appeals.

Section 250 of the Chandler Act carries such an intention on the part of Congress. In construing this section, it is significant, first, that it deals specifically and exclusively with appeals taken from orders allowing compensation or reimbursements, and second, that it provides expressly for limitation of time within which the appeal may be taken and it also provides that such appeals "be taken to *and allowed by the Circuit Court of Appeals* independently of other appeals in proceedings and shall be summarily heard upon the original papers." In other words, Congress, by this section, was dealing specifically with the subject of appeals from an order allowing compensation to those who had helped in the reorganization of the debtor. The last [fol. 102] clause squarely indicates the necessity of prompt disposition of the appeal. The clause "allowed by the Circuit Court of Appeals" can not be ignored. It suggests an intent to avoid frivolous appeals and appeals for purpose of delay. It necessitates the exercise of a discretion by the Circuit Court of Appeals to the end that delays may be avoided. At the same time, it protects the rights of those who are sincerely convinced that an allowance was either inadequate or extravagant. Dealing as it does, spe-

cifically with this subject-matter, it should be construed as exclusive.

The petition for rehearing is denied.

A true Copy:

Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[fols. 103-104] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—June 24, 1939

It is ordered by the Court that the Petition for a Rehearing of this cause be, and the same is hereby denied.

[fol. 105] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

MOTION OF APPELLEE TO CORRECT ORDER ENTERED BY THE CLERK ON MARCH 13, 1939—Filed July 11, 1939

Now comes the appellee, The Dickinson Industrial Site, Inc., by Benjamin Wham and Walter A. Wade and moves the court to correct the order entered by the clerk of this court, nunc pro tunc as of March 13, 1939 by adding thereto the further order that this cause shall be heard upon the original papers filed in cause No. 6842 in this court, so that said order will read as follows to-wit:

"It is ordered that the record in Cause No. 6842 in this court, consisting of the original papers, shall constitute the record in this cause, and that this cause shall be heard upon the original papers filed in cause No. 6842.

Further ordered that the record in this cause be not printed and that no briefs on the merits are required to be filed.

[fol. 106] Further ordered that this cause be set down for hearing on the merits and on all pending motions on Friday, April 14, 1939."

In support of said motion appellee attaches hereto the affidavit of George W. Ott.

The Dickinson Industrial Site, Inc., Appellee, by Walter A. Wade, Benjamin Wham, Its Attorneys. Walter A. Wade, Benjamin Wham, Attorneys for Appellee.

[fol. 107] [Title omitted]

AFFIDAVIT OF GEORGE W. OTT

George W. Ott, being first duly sworn, on oath deposes and says that he is an attorney associated with Walter A. Wade, one of the attorneys for the appellee Dickinson Industrial Site, Inc. in the above entitled cause and is duly authorized to make this affidavit on its behalf. Affiant further says that the attorneys for the appellants and the attorneys for the appellee in this cause filed their joint motion on March 13, 1939 for the consolidation of this cause with cause No. 6842 in this court and for the designation of a record upon which this cause could be heard and decided by this court.

[fols. 108-109] Affiant further says that upon the hearing of said motion this court ordered or directed that this cause should be heard upon the original papers filed in said cause No. 6842.

Affiant further says that the order of the clerk entered on March 13, 1939 is in words and figures as follows, to-wit:

It is ordered that the record in this cause be not printed and that no briefs on the merits are required to be filed.

Further ordered that this cause be set down for hearing on the merits and on all pending motions on Friday, April 14, 1939."

and fails to contain this order or direction of the court.

Affiant further says that said order should be corrected by amending the same to read as follows:

"It is ordered that the record in cause No. 6842 in this court, consisting of the original papers, shall constitute the record in this cause, and that this cause shall be heard upon the original papers filed in cause No. 6842.

Further ordered that the record in this cause be not printed and that no briefs on the merits are required to be filed.

Further ordered that this cause be set down for hearing on the merits and on all pending motions on Friday, April 14, 1939."

Affiant further says that unless said order of March 13, 1939 is corrected the record in this cause will fail to show upon what record of the District Court the appeal in this cause was heard and decided by this court, and, contrary to the fact, the record in this cause will show that no record of the District Court upon which the court could have heard and decided the appeal in this cause was before this court.

George W. Ott.

Subscribed and Sworn to before me this 11th day of July, 1939. Mae E. Burgess, Notary Public. (Seal.)

[fols. 110-111] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

MOTION OF APPELLEE TO STAY THE ISSUANCE OF THE MANDATE —Filed July 11, 1939

Now comes the appellee, The Dickinson Industrial Site, Inc., by Benjamin Wham and Walter A. Wade, its attorneys, and moves the court to stay the issuance of the mandate until the further order of this court, and in support of its said motion attaches hereto the affidavit of George W. Ott.

The Dickinson Industrial Site, Inc., Appellee, by Walter A. Wade and Benjamin Wham, Its Attorneys. Walter A. Wade, Benjamin Wham, Attorneys for Appellee.

[fols. 112-113] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

PROOF OF SERVICE—Filed July 11, 1939

To Julian Levi, Esquire, 38 South Dearborn St., Chicago, Ill.; Abraham Greenspahn, 11 South LaSalle Street, Chicago, Ill.:

Please Take Notice that we have this day filed in the office of the Clerk of the Circuit Court of Appeals for the 7th Circuit a motion for the correction of the order of said court entered March 13, 1939 and a motion for a stay of the issuance of the mandate of said court, copies of which motions together with the supporting affidavits are herewith served upon you.

Walter A. Wade, Benjamin Wham, Attorneys for Appellee.

Dated at Chicago, Illinois, this 11th day of July, 1939.

Received a copy of the above notice and motions therein referred to this 11th day of July, 1939.

Julian H. Levi, Abraham Greenspahn, Attorneys for Appellants.

[fol. 114] IN UNITED STATES CIRCUIT COURT OF APPEALS IN AND FOR THE SEVENTH CIRCUIT

[Title omitted]

REPLY OF APPELLANTS TO MOTION OF APPELLEE TO CORRECT ORDER ENTERED BY CLERK ON MARCH 13, 1939—Filed July 14, 1939

Now come Appellants, Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Committee acting under Deposit Agreement dated August 1, 1934, by Julian H. Levi, and in response to the Motion heretofore filed herein by The Dickinson Industrial Site, Inc., Appellee, for the entry of an order nunc pro tunc as of March 13, 1939, say:

(1) Said order of March 13, 1939 which was entered herein by the Clerk was entered upon a petition of both

[fol. 115] Appellee and Appellants to consolidate this cause, which is No. 6816, and Cause No. 6842. The order which was entered by the Clerk of this Court on March 13, 1939 was entered in both this Cause No. 6816 and in Cause No. 6842, and Appellants believe accordingly that if the order of March 13, 1939 is to be amended nunc pro tunc, said order should also provide that upon motion of Appellee and Appellants Cause No. 6816 and Cause No. 6842 were consolidated.

(2) The order proposed by Appellee refers to "original papers". Appellants believe that said order should describe said papers as the original papers filed in the District Court of the United States in and for the Northern District of Illinois, Eastern Division, since the inception of the cause known as "In the Matter of The Albert Dickinson Company, a corporation, Debtor, No. 36189" which were transmitted to the Clerk of this Court by the Clerk of the District Court pursuant to order entered by the District Court on December 28, 1938, together with the transcript of testimony thereafter approved by the Judge of the District Court and filed in these proceedings.

Appellants accordingly suggest that if this Court enters an order nunc pro tunc correcting the order entered by the Clerk of this Court as of March 13, 1939, that such order should read as follows:

"Upon motion of The Dickinson Industrial Site, Inc., formerly the Albert Dickinson Company, Debtor, Appellee, and Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Committee acting under Deposit Agreement dated August 1, 1934, Appellants,—

"It Is Hereby Ordered that Cause No. 6816 and Cause No. 6842 be and they hereby are consolidated.

[fol. 116] "It Is Further Ordered that the record in Cause No. 6842 in this Court consisting of all of the original papers filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, in a cause therein pending known as 'In the Matter of The Albert Dickinson Company, Debtor, No. 56189', which papers were transmitted by the Clerk of said District Court to the Clerk of this Court pursuant to an order of Court entered by the District Court on December 28, 1938, upon application of The Dickinson Industrial Site, Inc., Appellee

herein, shall constitute the record in this cause as consolidated, and that this cause shall be heard and determined upon the papers filed in this Court and upon the said original papers.

"It Is Further Ordered that the record in this cause as consolidated be not printed and that no briefs on the merits are required to be filed.

"It Is Further Ordered that this cause as consolidated be set down for hearing on the merits and on all pending motions on Friday, April 14, 1939."

"It Is Further Ordered that the entry of this order shall not affect or modify the consolidation of Causes Nos. 6816 and 6842 on March 13, 1939."

In support thereof, Appellants attach hereto the affidavit of Julian H. Levi.

Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Committee acting under Deposit Agreement dated August 1, 1934, Appellants, by Julian H. Levi, Abraham Greenspahn, Their Attorneys.

[fol. 117] [Title omitted]

AFFIDAVIT OF JULIAN H. LEVI

STATE OF ILLINOIS,
County of Cook, ss:

Julian H. Levi, being first duly sworn, upon oath deposes and says that he is an attorney and of counsel for Appellants, Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Committee, in the above entitled cause, and is duly authorized to make this Affidavit on their behalf.

Affiant further states that on March 13, 1939, attorneys for Appellants and attorneys for Appellee in this cause [fol. 118] filed their joint motion for the consolidation of Cause No. 6816 with Cause No. 6842; that the order of court which was entered herein on March 13, 1939 was entered under the numbers 6816 and 6842, and that affiant believes that the purport and effect of said orders, and the intention of the court and all of the parties hereto was

that said causes be consolidated; that this court would not hear and dispose of the issues in Cause No. 6816 on a record filed in Cause No. 6842 unless said causes were consolidated; that the appeals in Cause No. 6816 and Cause No. 6842 were appeals taken by various parties from the same order of court entered in the District Court of the United States in and for the Northern District of Illinois, Eastern Division, on October 26, 1938, and that it was the intention of this court to do complete and speedy justice between all parties in the appeal in Cause No. 6816 and Cause No. 6842 in entering its order of March 13, 1939 herein.

Affiant accordingly believes that if this court is to amend the order noted by the Clerk herein on March 13, 1939 nunc pro tunc it should also note the consolidation of the causes and should further provide that the entry of the nunc pro tunc order shall not affect, change or modify the consolidation of said causes on March 13, 1939.

Affiant further states that he believes the designation of the original papers referred to in the proposed order submitted by Appellee is not clear and precise and does not indicate the content and scope of the original papers and the fact that they were transmitted to this court on motion [fols. 119-120] of Appellee made before the District Court.

And further affiant sayeth not.

Julian H. Levi.

Subscribed and sworn to before me this 13th day of July, A. D. 1939. Amy R. Brons, Notary Public. (Seal.)

[fol. 121] In United States Circuit Court of Appeals for the Seventh Circuit

[Title omitted]

Proof of Service—Filed July 14, 1939

To Walter A. Wade, 38 South Dearborn Street, Chicago; Benjamin Wham, 231 South LaSalle Street, Chicago.

Please Take Notice that we have this day filed in the office of the Clerk of the United States Circuit Court of Appeals in and for the Seventh Circuit the Reply of Appellants to the Motion of Appellee to correct the order entered by the Clerk on March 13, 1939, copy of which Reply to-

gether with the supporting Affidavit is herewith served upon you.

Julian H. Levi, Abraham Greenspahn, Attorneys for Appellants.

State of Illinois,
County of Cook, ss:

Irwin J. Askow, being duly sworn, upon oath deposes and says that he served the foregoing notice together with copies of the documents therein referred to upon Walter A. Wade and Benjamin Wham by United States Mail, postage prepaid, this 14th day of July, A. D. 1939.

Irwin J. Askow.

Subscribed and sworn to before me this 14th day of July, A. D., 1939. Amy R. Brons, Notary Public. (Seal.)

[fol. 122] In United States Circuit Court of Appeals

[Title omitted]

Order Amending Order Setting Cause, etc.—July 14, 1939

On motion of counsel for appellees', It is now here ordered that the order of this Court heretofore entered in this cause on March 13, 1939 be, and the same is hereby amended nunc pro tunc as of March 13, 1939, to read as follows:

"It is ordered that the record in cause No. 6842 in this Court, consisting of the original papers, shall constitute the record in this cause, and that this cause shall be heard upon the original papers filed in Cause No. 6842.

Further ordered that the record in this cause be not printed and that no briefs on the merits are required to be filed.

Further ordered that this cause be set down for hearing on the merits and all pending motions on Friday, April 14, 1939."

[fols. 123-124] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER STAYING MANDATE—July 14, 1939

On motion of counsel for appellees, It is ordered that the Mandate in this cause be, and it is hereby stayed until the further order of this Court, and that counsel for appellees promptly file a petition for a writ of certiorari in the Supreme Court of the United States, and forthwith file proof of the filing of said Petition in this Court.

[fols. 125-126] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

PROOF OF SERVICE—Filed July 24, 1939

To Julian Levi, Esq., 38 S. Dearborn St.; Abraham Greenspahn, Esq., 11 S. LaSalle St., Chicago, Illinois.

Please Take Notice that we have this day filed in the office of the Clerk of the Circuit Court of Appeals for the Seventh Circuit a Praecipe for Record, a copy of which is herewith served upon you.

Dated at Chicago, Illinois, July 24, 1939.

Walter A. Wade, Benjamin Wham, Attorneys for The Dickinson Industrial Site, Inc., Appellee.

Received a copy of the foregoing notice and a copy of the Praecipe therein referred to, this 24th day of July, 1939.

Julian H. Levi, Abraham Greenspahn, Attorneys for Percy Cowan, et al., Appellants.

[fol. 127] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

PRAECIPE FOR RECORD—Filed July 24, 1939

The Clerk of the United States Circuit Court of Appeals for the Seventh Circuit will please prepare the record to be

filed with the Supreme Court of the United States with the petition for certiorari to review the order or decree of said Circuit Court of Appeals entered May 22, 1939, in the above entitled cause, on appeal from a certain order of the District Court of the United States for the Northern District of Illinois, Eastern Division.

The record to be prepared shall include and be a transcript of the following:

A. From the record filed in cause No. 6842 in said Circuit Court of Appeals, being the original papers filed in the District Court of the United States for the Northern District of [fol. 128] Illinois, Eastern Division:

1. Petition for reorganization filed in the District Court June 18, 1934.

2. Order entered by the District Court September 10, 1934, allowing an amendment to the petition for reorganization.

3. Amendment to petition for reorganization filed in the District Court September 10, 1934.

4. Answer to the petition for reorganization filed in the District Court September 10, 1934.

5. Order of the District Court approving petition for reorganization entered September 10, 1934.

6. Order of the District Court confirming plan of reorganization entered February 23, 1938.

7. Order of the District Court entered March 5, 1938, amending order confirming plan of reorganization.

8. Order of the District Court entered October 26, 1938, allowing compensation and reimbursement for expenses.

9. Notice of appeal filed in the District Court December 5, 1938.

10. Appeal bond filed in the District Court on December 23, 1938.

11. Praecipe for record filed in the District Court December 23, 1938, by Samuel E. Hirsch, et al.

12. Notice of the filing of the foregoing praecipe filed in the District Court December 23, 1938.

13. Praecipe for record filed in the District Court December 23, 1938, by Wham & O'Brien, et al.

[fol. 129] 14. Notice filed in the District Court December 28, 1938.

15. Order entered by the District Court on December 28, 1938, directing the Clerk of the District Court to authenticate and transmit to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit the original papers filed in the District Court.

16. Certificate of the Clerk of the District Court to the record filed in the District Court January 5, 1939.

B. From the record in the United States Circuit Court of Appeals for the Seventh Circuit in the above entitled cause:

1. Petition of Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Protective Committee acting under Deposit Agreement dated August 1, 1934, for the allowance of an appeal from the order of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered October 26, 1938, in cause No. 56189 in said District Court, and assignment of errors, filed November 25, 1938.

2. Proof of service and notice of the filing of petition for allowance of appeal and assignment of errors, filed November 26, 1938.

3. Order entered December 13, 1938, allowing appeal.

4. Recital of filing of appeal bond filed December 22, 1938.

5. Order entered December 22, 1938, approving appeal bond.

6. Citation with proof of service thereof filed December 28, 1938.

7. Appearance of Walter A. Wade and Benjamin Wham, filed January 10, 1939.

[fol. 130] 8. Motion of appellee, The Dickinson Industrial Site, Inc., formerly the Albert Dickinson Company, to dismiss the appeal allowed December 13, 1938 (only) filed January 10, 1939.

9. Order entered January 10, 1939, extending time to file transcript, etc.

10. Recital of the filing of the brief and argument in response to the motion to dismiss the appeal on January 16, 1939.

11. Recital of the filing of reply brief of appellee on January 20, 1939.

12. Order entered January 20, 1939, continuing motion to dismiss to the hearing on the merits.

13. Motion filed January 27, 1939, to extend time for filing transcript of record (only).

14. Motion to consolidate, etc. filed March 13, 1939 (only).

15. Order entered March 13, 1939, relating to the record and the filing of briefs.

16. Order entered April 14, 1939, showing the renewal of the motion to dismiss, etc.

17. Opinion of the court filed May 22, 1939.

18. Order entered May 22, 1939, denying the motion to dismiss.

19. Decree entered May 22, 1939.

20. Recital of the filing of petition for re-hearing on June 8, 1939.

21. Recital of the filing of reply to petition on June 17, 1939.

[fol. 131] 22. Opinion of the court on rehearing filed June 24, 1939.

23. Order entered June 24, 1939, denying re-hearing.

24. Motion of appellee, The Dickinson Industrial Site, Inc. to correct the order entered by the Clerk on March 13, 1939, nunc pro tunc as of that date with supporting affidavit, filed July 11, 1939.

25. Motion of appellee, The Dickinson Industrial Site, Inc. to stay the issuance of the mandate (only).

26. Proof of service and notice of filing of the foregoing motions filed on July 11, 1939, filed July 11, 1939.

27. Reply of appellants to motion of appellee to correct order entered by the Clerk on March 13, 1939, together with affidavit in support thereof, filed July 14, 1939.

28. Proof of service of reply filed July 14, 1939.

29. Order entered July 14, 1939, correcting order of March 13, 1939.

31. Order entered July 14, 1939, staying issuance of mandate.

31. This praecipe for record.

32. Proof of service of this praecipe for record.

33. Placita.

34. Certificate of the Clerk of the U. S. Circuit Court of Appeals for Seventh Circuit authenticating the record.

Dated at Chicago, Illinois, July 24th, 1939.

Walter A. Wade, Benjamin Wham, Attorneys for Appellee, The Dickinson Industrial Site, Inc.

[fol. 132] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 6, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

SEP 14 1939

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 386

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,
Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE AND JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WALTER A. WADE,
BENJAMIN WHAM,
GEORGE W. OTT,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 386

IN THE MATTER OF THE ALBERT DICKINSON COMPANY, A CORPORATION,

Debtor.

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,

Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE AND JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Dickinson Industrial Site, Inc., a corporation, submits this petition for a writ of certiorari to review a decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered May 22, 1939,

modifying and affirming, as modified, an order of the United States District Court for the Northern District of Illinois, Eastern Division, and files herewith a certified copy of a transcript of such portions of the record in said cause as were designated by the præcipe filed therein, and its brief in support of this petition.

Summary of the Matter Involved.

This petition presents a single question:

Does the Bankruptcy Act invest the Circuit Courts of Appeals with jurisdiction to allow an appeal from an order of the bankruptcy court allowing or refusing to allow compensation in proceedings for the reorganization of corporations, when the amount involved in the order is more than $500?

Statement of the Matter Involved.

On June 13, 1934, a creditors' petition for the reorganization of petitioner under Section 77B of the Bankruptcy Act was filed in the District Court (R. 1, *et seq.*) This petition, as subsequently amended, and petitioner's answer thereto, were approved by the District Court on September 10, 1934 (R. 10). On February 23, 1938, the District Court confirmed a plan of reorganization (R. 16).

Thereafter, respondents and others filed petitions for the allowance of compensation and reimbursements for expenses. In their petition respondents requested an allowance of $20,000 for compensation to them for their services in the reorganization (R. 40-41, 49). These petitions were referred to a Special Master who took testimony and reported (R. 26). On October 26, 1938, the District Court ordered allowances of compensation and reimbursement to the various applicants (R. 26). Respondents were allowed but $2,000 of the $20,000 requested by them (R. 26).

On November 25, 1938, respondents filed their petition in the Court of Appeals asking that leave be granted them to appeal from the order of October 26, 1938, fixing their compensation at $2,000 (R. 34, *et seq.*).

On December 5, 1938, petitioner filed in the Court of Appeals its petition asking that leave be granted to it to appeal from the same order with respect to allowances of compensation to certain other applicants (R. 48-49). This petition was docketed in the Court of Appeals as Cause No. 6822, to which the Court of Appeals refers in its present opinion (R. 49, 51).

On the same day, December 5, 1938, petitioner also filed in the District Court a notice of appeal from the order of October 26, 1938 (R. 28). This appeal was docketed in the Court of Appeals as Cause No. 6842, to which the Court of Appeals also refers in its present opinion (R. 48).

On December 13, 1938, the Court of Appeals granted leave to respondents to appeal from the order of October 26, 1938 (R. 42). Petitioner's petition for leave to appeal from this order was denied (R. 49), the court being of the opinion that it had no jurisdiction to allow the appeal.

On December 28, 1938, the District Court granted petitioner's motion for an order directing the clerk of that court to authenticate and transmit to the clerk of the Court of Appeals the original papers filed in the proceedings, pursuant to petitioner's notice of appeal, filed December 5, 1938, and Section 250 of the Bankruptcy Act (R. 33). The original papers in the proceedings were duly authenticated and transmitted to the clerk of the Court of Appeals and filed as the record in Cause No. 6842 (R. 38, 67).

On January 10, 1939, petitioner filed its motion in the Court of Appeals to dismiss the appeal from the order of October 26, 1938, which that court had allowed to respondents on December 13, 1938, on the ground that the Court of

Appeals had no jurisdiction to allow the appeal (R. 43). After briefs had been filed, the Court of Appeals continued the motion to the hearing on the merits (R. 44).

Controversies over the allowances made by the District Court then existing between petitioner and the appellees in Cause No. 6842, excepting the controversy with the appellee, Glenn, Real & Browning, were settled during the pendency of the appeal and prior to the hearing before the Court of Appeals (R. 48).

The instant case was heard by the Court of Appeals with Cause No. 6842 on the original papers which had been transmitted by the clerk of the District Court and filed in the latter cause (R. 67). At the hearing the Court of Appeals affirmed the order of the District Court as to the allowance made to Glenn, Real & Browning and took under advisement petitioner's motion to dismiss respondents' appeal (R. 47).

The Court of Appeals thereafter denied petitioner's motion to dismiss respondents' appeal (R. 47) and, at the same time, modified the order of the District Court by increasing respondents' allowance from $2,000 to $10,000, and affirmed the order as so modified (R. 57).

Reasons Relied Upon for the Allowance of the Writ.

The reasons relied upon for the allowance of the writ herein are:

(1.) The present decision is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *London, et al.* v. *O'Dougherty*, 102 F. (2d) 524, denying the allowance of an appeal from an order awarding compensation in a proceedings for the reorganization of a corporation when the amount involved in the order was more than $500. In its suplemental opinion, the Circuit Court of Appeals for the Seventh Circuit recognized the existence of this conflict in the following words (R. 58):

"The deference we owe to, and the respect we have for the views of, the Second Circuit Court of Appeals, which reached a different conclusion in *London* v. *O'Dougherty*, 102 F. (2d) 524, have added to our anxieties."

The present decision is also in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *In re Winton Shirt Corporation*, 104 F. (2d) 777, where it was held that "by the amendment [Section 24a of the 1938 amendments] the troublesome distinction between 'controversies' and 'proceedings' existing under the prior statute has been eliminated," and with the decision of the Circuit Court of Appeals for the Ninth Circuit in *England* v. *Ducasse*, 104 F. (2d) 760, holding that "since it [the order] involves over $500, the proposed appeal is not allowable by this Court."

(2.) The question, whether appeals from orders of the bankruptcy courts, allowing or refusing to allow compensation or reimbursement in proceedings for the reorganization of corporations, when the amount involved in any such order is over $500, may be taken as a matter of right or must be allowed by the Circuit Court of Appeals, is an important question of federal law which has not been, but should be, settled by this Court. Otherwise, elimination of the uncertainty as to the proper manner of appeal, which it was one of the purposes of the 1938 amendments of the Bankruptcy Act to accomplish, will not be achieved, and the wasteful practice of pursuing simultaneously two methods of appeal, which prevailed under the Bankruptcy Act prior to these amendments, will be continued. In view of the existing conflict in the decisions of the Circuit Courts of Appeals, it is only by a decision of this Court that the manner of appealing from these orders may be determined and the practice settled.

WHEREFORE, petitioner prays that this petition for a writ of certiorari may be granted and that this Court proceed as is provided by law and the rules of this Court in such cases, and that upon final hearing, the decree of the United States Circuit Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

WALTER A. WADE,
BENJAMIN WHAM,
GEORGE W. OTT,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I.

Opinion Below.

The opinion and supplemental opinion of the Circuit Court of Appeals for the Seventh Circuit is printed in full in the record (R. 48, 58) and is reported in 104 F. (2d) 771.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347 (a)).

The decree sought to be reviewed was entered by the Circuit Court of Appeals on May 22, 1939 (R. 57), and petition for rehearing was denied by that Court on June 24, 1939 (R. 60).

III.

Statement of the Case.

The facts pertinent to the question here presented are sufficiently recited in the Petition under the caption "Statement of the Matter Involved."

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

(1) In allowing an appeal to respondents from the order of the District Court, when the amount involved in the order was more than $500.

(2) In denying petitioner's motion to dismiss the appeal.

(3) In holding that it had jurisdiction to allow the appeal.

(4) In reviewing the order of the District Court upon the appeal which it had allowed.

(5) In modifying and in affirming, as modified, the order of the District Court.

V.

Summary of Argument.

The Chandler Act amendments, which became effective September 22, 1938, govern the appeal from the order entered by the District Court on October 26, 1938. Section 250 of the Act does not invest the Courts of Appeals with jurisdiction to allow appeals from orders relating to allowances of compensation or reimbursement for expenses. By the terms of that Section, appeals from these orders must be taken or allowed in the manner provided for by Section 24 of the Act, which limits the jurisdiction of the Courts of Appeals over allowances of appeals to orders involving less than $500.

Section 24a eliminates the distinction, in respect of appeals, between "proceedings" and "controversies" which existed under former Section 24; and it is not the intent of Section 250 to retain this distinction. The construction of Section 250 by the Court of Appeals in the present decision ignores the words "in the manner • • • provided for appeals by this Act" and the words "Appeals may be taken • • • from orders making or refusing to make allowances", in that Section, and completely ignores Section 5b of the amendatory Act. Nor does this construction further a more expeditious disposition of the proceedings, which is the principal reason advanced by the Court of Appeals in support of this construction. The extension of time for appeal to forty days under Section 25a of the Act is

incompatible with an intent to expedite the proceedings by circumscribing appeals from orders of the bankruptcy courts.

VI.

ARGUMENT.

The Bankruptcy Act does not invest the Circuit Courts of Appeals with jurisdiction to allow an appeal from an order of the Bankruptcy Court allowing or refusing to allow compensation in proceedings for the reorganization of corporations, when the amount involved in the order is more than $500.

The Court of Appeals holds that Section 250 of the Bankruptcy Act vests exclusive jurisdiction in the Courts of Appeals over the allowance of appeals from orders relating to compensation and reimbursement in proceedings for reorganization of corporations, and that this jurisdiction is wholly independent of the jurisdiction over the allowance of appeals vested in the Courts of Appeals by Section 24a of the Bankruptcy Act.

Section 24a (52 Stat. at L. 854; 11 U. S. C. A. Sec. 47a) is as follows:

> "The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact; Provided, however, That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law

only: Provided further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court."

Section 24b (52 Stat. at L. 854; 11 U. S. C. A. Sec. 47b) is as follows:

"Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

Section 250 (52 Stat. at L. 901; 11 U. S. C. A. Sec. 650) is as follows:

"Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

These sections are new and were incorporated in the Bankruptcy Act by the amendatory Act of June 22, 1938 (Chapter 575, 52 Stat. at L. 840-940), commonly called the "Chandler Act", which became effective September 22, 1938 (52 Stat. at L. 940).

The Bankruptcy Act, prior to the Chandler Act amendments, made provision for appeals from orders of the bankruptcy court, which, so far as pertinent here, is as follows:

Section 24(a) (11 U. S. C. Sec. 47(a)):

"The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeal of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers and during their respective terms, are invested with appel-

late jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases."

Section 24(b) (11 U. S. C. Sec. 47(b)):

"The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in section 48 of this title) the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said section 48 of this title to be allowed in the discretion of the appellate court."

Section 77B (c) (9) (11 U. S. C. A. Sec. 207 (c) (9)):

"(c) Upon approving the petition or answer or at any time thereafter, the judge * * * (9) may allow a reasonable compensation for the services rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and the plan * * * but appeals from orders fixing such allowances may be taken to the Circuit Court of Appeals independently of other appeals in the proceeding and shall be heard summarily."

Section 4 of the amendatory Act repeals all parts of the Bankruptcy Act of 1898 inconsistent with the amendatory Act "Except to the extent necessary to give effect to the provisions of Section 6 of the amendatory Act" (52 Stat. at L. 940): and Section 6b of the amendatory Act provides that "Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect." (52 Stat. at L. 940.)

Obviously, Section 24 of the Chandler Act is inconsistent with former Section 24. It is also clear that the application of Section 24 of the Chandler Act to appeals from orders entered in pending proceedings after the effective date of the amendatory Act is "practicable" within the meaning of Section 6b. It follows, therefore, that former Section 24 was *repealed* on the effective date of the amendatory Act by Section 4, at least in respect of appeals from orders thereafter entered.

Section 276c of the Chandler Act (52 Stat. at L. 905; 11 U. S. C. A. Sec. 676c) has no application to appeals. This section continues Section 77B in force as to proceedings pending upon the effective date of the amendatory Act, except:

> "(2) If the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable."

While Section 276c (2) declares that in pending cases the provisions of Chapter X (Corporate Reorganization Section) of the Chandler Act shall apply to the extent that the judge shall deem their application practicable, it seems obvious that this has reference only to the regulation of proceedings before the District Court after June 22, 1938, the date of the approval of the Act, and not to appeals. Appeals under the Bankruptcy Act, prior to the Chandler Act amendments, were not discretionary with the District Court. They were either taken in the District Court as a matter of right or were allowed by the Court of Appeals in its discretion. This is also true under the Chandler Act amendments. Hence, in respect of appeals it is immaterial whether or to what extent the District Court might deem the Chandler Act applicable to pending proceedings.

Moreover, appeals from orders allowing or refusing to allow compensation in proceedings under Section 77B were authorized, not by sub-section (c) (9) of Section 77B, but by Section 24b (11 U. S. C. 47(b)), to be allowed in the discretion of the Court of Appeals (*Shulman* v. *Hotel Co.*, 301 U. S. 172). Unlike Section 77B for which Chapter X of the Chandler Act is substituted, Section 24(b) was repealed with no other saving clause than that contained in Section 6 of the amendatory Act.

Clearly, appeals from orders entered in bankruptcy proceedings after September 22, 1938, the effective date of the amendatory Act, are governed by the Chandler Act. On this point, the Court of Appeals holds that the appeal from the order of October 26, 1938, is governed by the Chandler Act. In this respect the present decision is correct and is in accord with the decision of the Court of Appeals for the Second Circuit in *London* v. *O'Dougherty*, 102 F. (2d) 524.

It is, however, with respect to the construction of the provisions of the Chandler Act relating to appeals that the present decision is erroneous and is in direct conflict with the decision in the *London* case.

The *London* case holds that Section 250 of the Chandler Act incorporates Section 24 by reference and thereby limits the jurisdiction of the Courts of Appeals in the allowance of appeals from orders relating to compensation to orders involving less than $500. The court said in a *per curiam* opinion (102 F. (2d) 524) at page 525:

> "The question raised by this motion is whether one must secure the leave of this court to appeal from an order awarding him too small an attorney's allowance in a reorganization under the Bankruptcy Act. Section 24a, 11 U. S. C. A. Sec. 47 (a), requires leave only in case the order 'involves less than $500', and if it governs this appeal, no leave was therefore necessary, for the appellant asked more than $500. However, ap-

peals from allowances are directly governed by Sec. 250, 11 U. S. C. A. Sec. 650, which provides that 'appeals may be taken in matters of law or fact' from such orders, 'and may, in the manner and within the time provided for appeals by this Act (title), be taken to and allowed by the circuit court of appeals'. This language necessarily incorporates the provisions of Sec. 24a as to the 'manner' of taking an appeal, which need not be 'allowed' by us, but lies as of right."

The present decision of the Court of Appeals is also in conflict with its own prior decisions. In denying petitioner's petition for leave to appeal from the order of October 26, 1938, which had been filed within forty days, but more than thirty days, from the entry of the order, and was docketed as Cause No. 6822 (R. 49), the Court of Appeals stated in a memorandum opinion filed December 19, 1938:

"First, it is claimed that an appeal addressed to the discretion of this court should be filed within thirty days, and that otherwise the court is without jurisdiction. *Shreiner* v. *Farmers Trust Co.*, 91 F. (2d) 606, and cases therein cited, is cited as authority for such proposition. Undoubtedly the rule is as therein announced, unless the matter of the appeal is controlled by the Bankruptcy Act of 1938 (now Chandler Act.) Under Section 25(a) of the Bankruptcy Act as amended by this Act (Title 11 U. S. C. A. 48), the appeal may be taken within forty days. Under Section 24(a) of the amended Act Title 11 U. S. C. A. 47), however, it seems definite that the allowance of an appeal by this court is permissible only when there is less than $500 involved. Here the amounts involved are each more than that amount. So it is apparent that under either theory, the appeal should not be allowed."

In Cause No. 6842, the Court of Appeals *affirmed* the order of October 26, 1938, as to the only appellee left in the case, upon an appeal which petitioner had taken as a matter

of right by filing a notice of appeal in the District Court (R. 28, 48, 67).

In its present decision, the Court of Appeals holds that Section 250 of the Chandler Act vests in the Courts of Appeals exclusive jurisdiction over the allowance of appeals from orders relating to compensation without regard to the amount involved, and that it was not the intention of Congress to limit this jurisdiction by reference to Section 24.

Section 250 provides that appeals from orders making or refusing to make allowances of compensation or reimbursement may "in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers." This Section regulates in some particulars the procedure on appeal, but the language used clearly negatives any intent to provide in this Section for "the manner" of appeal from these orders. On the contrary, this Section declares that the manner of appeal has been provided for elsewhere in the Act, and that appeals from orders allowing or refusing to allow compensation or reimbursement shall be taken and allowed in the same manner.

Section 24 of the Chandler Act authorizes appeals from orders both in proceedings in bankruptcy and in controversies arising in proceedings in bankruptcy to be taken to the Court of Appeals, except in cases where the amount involved in any such order is less than $500, when the appeal must be allowed by the Court of Appeals. The reference in Section 250 is undoubtedly to this Section as to the manner of appeal, and to Section 25a as to the time for appeal. The words "Appeals may be taken * * * from orders making or refusing to make allowances * * * and may * * * be taken to and allowed by the Circuit Court of appeals" in Section 250 embraces both manners of appeal provided for by Section 24.

Section 250 is substantially a re-enactment of Subdivision (c) (9) of Section 77B. Although Subdivision (c) (9) made no reference to other sections of the Bankruptcy Act, it was uniformly held that allowances of compensation were "proceedings" which could be reviewed only under Section 24 (b), upon the allowance of an appeal by the Courts of Appeals (*Shulman* v. *Hotel Co.*, 301 U. S. 172; *Dee* v. *United Exchange Building*, 88 F. (2d) 372; Vol. 3 Gerdes Corporate Reorganizations, Sec. 1207, p. 1935; and cases cited). The reference contained in Section 250 to other sections of the Act as to the provisions made for the manner and time of appeal from orders required to be allowed by the Courts of Appeals is an express adoption of this construction.

It would seem unlikely that any doubt could arise as to the incorporation by Section 250 of Section 24 and Section 25; but if doubt as to this can be deemed to exist, this doubt is dispelled by Section 5b of the amendatory Act (52 Stat. at L. p. 940), which provides that:

> "Section and subdivision headings shall not be taken to govern or limit the scope of the sections or subdivisions to which they relate."

Section 24a of the Chandler Act eliminates entirely the distinction, as respects the manner of appeal, between orders in "controversies arising in bankruptcy proceedings" and orders in "proceedings of the several inferior courts of bankruptcy" which existed under sub-sections (a) and (b) of former Section 24. The *proviso* that an appeal from an order which involves less than $500 may be taken only upon an allowance by the appellate court applies both to "proceedings" and to "controversies". The only possible end to be gained by amending Section 24 was the elimination of this troublesome distinction, which had given rise to so much litigation (In re Winton Shirt Corporation, 104 F. (2d) 777).

However, the Court of Appeals holds that it is the intent of Section 250 to guard against the obliteration of this distinction in respect of appeals from orders relating to compensation and reimbursement. This construction does violence to the language of that Section. It ignores the words "in the manner * * * provided for appeals by this Act," and the words "Appeals may be taken * * * from orders making or refusing to make allowances." It also ignores Section 5b of the amendatory Act. Nor does this construction further a more expeditious administration, which is the principal reason advanced by the Court of Appeals in support of this construction.

Allowances of compensation usually cannot be made until a plan of reorganization is approved, or some other disposition is made of the proceedings, for, until then, an evaluation of the services which have been or which may thereafter be rendered is impossible. When this point is reached, the District Court can and will fix the amount of compensation and terms of payment with due regard to the value of the services, to the ability of the estate or of the reorganized corporation to pay, and to the plan of reorganization, if one has been approved. It is extremely improbable that appeals from orders relating to compensation could impede the proceedings or would be likely to do so.

Certainly, greater danger to the expeditious disposition of these proceedings lies in appeals from other orders which under Section 24 of the Chandler Act may be taken as a matter of right. And if Congress had believed that appeals would vexatiously and unnecessarily obstruct the speedy conclusion of proceedings in the bankruptcy courts, it would not have extended the time for appeal (and for leave to appeal) to forty days, as it did under Sec. 25a of the Chandler Act (52 Stat. at L. 855, 11 U. S. C. A., Sec. 48a; cf: 11 U. S. C. Sec. 47(c)).

But the danger of delay by appeals from orders relating to compensation and reimbursement, if it exists, is removed by the provision in Section 250, that appeals "shall be summarily heard upon the original papers." Less time is lost, in obtaining a summary hearing upon the original papers than in preparing and filing a petition for the allowance of an appeal and supporting brief, which may not be acted upon for some time, and, if allowed, will result in further delay.

Conclusion.

We respectfully submit that for the reasons stated the petition for certiorari filed herein should be granted.

Respectfully submitted,

WALTER A. WADE,
BENJAMIN WHAM,
GEORGE W. OTT,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 386

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,
Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE AND JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934,
Respondents.

BRIEF FOR PETITIONER.

WALTER A. WADE,
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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 386

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,
Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE AND JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934,
Respondents.

BRIEF FOR PETITIONER.

MAY IT PLEASE THE COURT:

This case comes to this Court on a writ of certiorari directed to the Circuit Court of Appeals for the Seventh Circuit, to review a decree of that court modifying and affirming, as modified, an order made for the allowance of compensation to respondents by the District Court of the United States for the Northern District of Illinois, Eastern Division, in a proceeding under the Bankruptcy Act for the corporate reorganization of petitioner.

The appellate jurisdiction of the Court of Appeals to review and modify the order of the District Court was exercised upon an appeal from the order which the Court of Appeals allowed to respondents. The Court of Appeals denied petitioner's motion to dismiss the appeal, and, after a hearing, increased respondents' compensation from $2,000 to $10,000. The basis of petitioner's motion to dismiss the appeal was, and its contention here is, that more than $500 being involved in the order, an appeal therefrom could have been taken only in the District Court, and not having been so taken, the attempted appeal must be dismissed for want of jurisdiction, the jurisdiction of the Court of Appeals over the allowance of appeals being limited to orders involving less than $500. Ruling adversely to this contention, the Court of Appeals held that the order was appealable only upon allowance by the appellate court.

REFERENCE TO OPINIONS BELOW.

The Court of Appeals filed two opinions. The first was filed May 22, 1939, and the second, on petition for rehearing, was filed June 24, 1939. These opinions are reported in 104 F. (2d) 771, and appear in the record at p. 48, *et seq.*, and p. 58, *et seq.*

STATEMENT AS TO JURISDICTION.

The decree of the Court of Appeals, affirming, as modified, the order of the District Court, was entered May 22, 1939 (R. 57). Petitioner's petition for rehearing in the Court of Appeals was denied June 24, 1939 (R. 60). Petition for certiorari was filed in this Court September 14, 1939, and was granted November 6, 1939. The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

On June 13, 1934, a creditors' petition for the reorganization of petitioner under Section 77B of the Bankruptcy Act was filed in the District Court (R. 1). This petition, as subsequently amended, and petitioner's answer thereto, were approved by the District Court on September 10, 1934 (R. 10). On February 23, 1938, the District Court confirmed a plan of reorganization (R. 16).

Thereafter, respondents and others filed petitions for the allowance of compensation and reimbursement for expenses. Respondents are a bondholders Committee, which was organized during the pendency of the proceeding under a Deposit Agreement dated August 1, 1934, and as such Committee came eventually to represent approximately 70% of the outstanding real estate bonds issued by petitioner (R. 36). In their petition, respondents requested an allowance of $20,000 for compensation to them for their services in the reorganization (R. 40, 41, 59). These petitions were referred to a Special Master, who took testimony and reported (R. 26). On October 26, 1938, the District Court ordered allowances of compensation and reimbursement to the various applicants (R. 26). Respondents were allowed $2,000 of the $20,000 requested by them (R. 26).

On November 25, 1938, respondents filed their petition in the Court of Appeals asking that leave be granted to them to appeal from the order of October 26, 1938, fixing their compensation at $2,000 (R. 34). With their petition respondents filed an assignment of error (R. 40). The following day respondents served petitioner with copies of these papers together with notice that the originals thereof had been filed in the Court of Appeals on the previous day (R. 41).

On December 5, 1938, petitioner filed in the District

Court a notice of appeal from the order of October 26, 1938, with respect to allowances of compensation to certain other applicants (R. 28). This appeal was later docketed in the Court of Appeals as Cause No. 6842, and is referred to by the Court of Appeals in its present opinion (R. 48). On the same day, December 5, 1938, petitioner filed in the Court of Appeals its petition asking that leave be granted to it to appeal from the order of October 26, 1938, with respect to the allowances of compensation made to these applicants (R. 49). This petition was docketed in the Court of Appeals as Cause No. 6822, and is also referred to by the Court of Appeals in its present opinion (R. 49, 50).

On December 13, 1938, the Court of Appeals allowed an appeal to respondents from the order of October 26, 1938 (R. 42). On December 19, 1938, the Court of Appeals denied petitioner's petition for the allowance of an appeal from this order (R. 49), the Court being of the opinion that it had no jurisdiction to allow the appeal.

The Court of Appeals thereafter approved the appeal bond filed by respondents, as required by the order allowing the appeal, and issued a citation to petitioner which was duly served by respondents and filed December 28, 1938 (R. 42). On January 10, 1939, petitioner filed its motion in the Court of Appeals to dismiss the appeal on the ground that the Court of Appeals had no jurisdiction to allow or entertain the appeal (R. 43). After briefs had been filed, the Court of Appeals continued the motion to the hearing on the merits (R. 44).

Controversies over the allowances made by the District Court then existing between petitioner and the appellees in Cause No. 6842, excepting the controversy with the appellee, Glenn, Real & Browning, were settled during the pendency of the appeal and prior to the hearing before the Court of Appeals (R. 48).

By order of the Court of Appeals the instant case was heard with Cause No. 6842 on the original papers which had been transmitted by the clerk of the District Court and filed by petitioner as the record in the latter cause (R. 67). At the hearing the Court of Appeals affirmed, in Cause No. 6842, the order of the District Court as to the allowance made to Glenn, Real & Browning (R. 48) and took under advisement petitioner's motion to dismiss respondents' appeal (R. 47).

The Court of Appeals thereafter, on May 22, 1939, denied petitioner's motion to dismiss the appeal (R. 47), and, at the same time, modified the order of the District Court by increasing respondents' allowance from $2,000 to $10,000, and affirmed the order as so modified (R. 57).

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred:

(1) In allowing an appeal to respondents from the order of the District Court, when the amount involved in the order was more than $500.

(2) In denying petitioner's motion to dismiss the appeal.

(3) In holding that it had jurisdiction to allow the appeal.

(4) In reviewing the order of the District Court upon the appeal which it had allowed.

(5) In construing the Chandler Act to permit appeals from orders making or refusing to make allowance of compensation or reimbursement for expenses to be taken only upon allowance by the appellate court.

(6) In modifying and in affirming, as modified, the order of the District Court.

SUMMARY OF ARGUMENT.

I.

An appeal from the order of October 26, 1938, is governed by the Chandler Act amendments which became effective September 22, 1938, more than one month prior to the entry of the order. Appeals from orders in proceedings under Section 77B of Chapter VIII of the Bankruptcy Act are not authorized except as provision has been made for appeals by Sections 24 and 25 of Chapter IV of the Bankruptcy Act. Former Sections 24 and 25 are not continued in force as to orders to which the application of Sections 24 and 25 of the Chandler Act is "practicable". The practicability of applying Sections 24 and 25 of the Chandler Act is not a matter of judicial discretion to be exercised by the District Court under Section 276c(2) of the Chandler Act, but is a matter which must be judicially determined under Section 6b of the amendatory act by the appellate court whose jurisdiction is sought to be invoked. Obviously, the application of Sections 24 and 25 of the Chandler Act to the order of October 26, 1938, was entirely "practicable", and the appeal from the order was, therefore, governed by the provision made for appeals by these Sections of the Chandler Act. (*London* v. *O'Dougherty*, 102 F. (2d) 524.) There is no question here of the retroactive application of the Chandler Act or of disturbing vested rights.

II.

The Court of Appeals had no jurisdiction to allow an appeal from the order of October 26, 1938. Section 24 of the Chandler Act confers jurisdiction upon the circuit courts of appeals to allow appeals from orders of the bank-

ruptcy courts, and, at the same time, limit this jurisdiction to orders, decrees or judgments which involve less than $500. This limited jurisdiction is not confined to the liquidation provisions of the Chandler Act (Chapters I to VII), but applies generally to all orders, decrees or judgments of the bankruptcy courts of this class. Sections 250 of the Chandler Act does not enlarge, restrict, or in any manner modify the appellate jurisdiction vested in the circuit courts of appeals by Section 24, or nullify this limitation. Section 250 incorporates Sections 24 and 25. (*London* v. *O'Dougherty*, 102 F. (2d) 524.) The construction of the Chandler Act by the Court of Appeals contravenes well-recognized rules of construction and violates, not only positive provisions of the Chandler Act, but also its policy and spirit. Under the Bankruptcy Act, prior to the Chandler Act amendments, the method and scope of review were made to depend upon the character of the proceedings. Under the Chandler Act amendments the scope of review is made uniform in all cases and the method of appeal is no longer made to depend upon the character of the proceedings, but depends solely upon the amount involved. The language contained in Section 250 cannot be so construed as to ascribe to Congress an intent to retain the distinctions which formerly governed appeals from the orders of the bankruptcy courts.

The construction placed upon Section 250 by the Court of Appeals does not further a more expeditious administration. But even if this were so, the same argument would apply with even greater force to all orders of the bankruptcy court entered in what are strictly "proceedings in bankruptcy". There is nothing contained in the Chandler Act which would indicate an intent to expedite the proceedings by restricting appeals.

III.

The appeal from the order involved in this case could have been taken only in the District Court, and not having been so taken, the Court of Appeals should have dismissed the attempted appeal for want of jurisdiction to entertain it. The Court of Appeals has no discretion to entertain an appeal which has not been taken in the manner authorized by law.

Formerly appeals were taken in the District Court upon allowance, but are now taken by the filing of a notice of appeal in the District Court. Respondents neither secured the allowance of an appeal in the District Court nor filed a notice of appeal in the District Court.

It is doubtful whether respondents' petition for leave to appeal can be construed as a notice of appeal. But even if it should be so construed, it was not filed in the District Court but in the Court of Appeals. To permit a notice of appeal to be filed in a court other than the District Court in which the judgment was rendered would lead to endless confusion, and, certainly, such practice is neither contemplated nor authorized by the Rules of Civil Procedure. Under the Rules of Civil Procedure the filing of the notice of appeal in the District Court is the effective act by which the appellate jurisdiction of the Circuit Court of Appeals is invoked. Notification of the filing of the notice of appeals is not jurisdictional, but merely procedural. Notification to the parties that an appeal has been, or is about to be, taken from a judgment of the District Court cannot be substituted for the filing of a notice of appeal in the District Court within the time prescribed by law.

The express provisions of the Chandler Act, or of the Rules of Civil Procedure, cannot be dispensed with on equitable grounds.

IV.

The merits of the controversy which existed between respondents and petitioners in the courts below are not presented to this Court for review. Petitioner does not admit the justice of the allowance made to respondents by the Court of Appeals, and states that the conclusions reached by the Court of Appeals are based upon a misapprehension of the facts, particularly with reference to what it termed "the outstanding advantages of the plan" and the services rendered by respondents in connection with these supposed "outstanding advantages".

ARGUMENT.

I.

AN APPEAL FROM THE ORDER OF OCTOBER 26, 1938, IS GOVERNED BY THE CHANDLER ACT AMENDMENTS, WHICH BECAME EFFECTIVE SEPTEMBER 22, 1938.

The order from which respondents secured the allowance of an appeal by the Court of Appeals was entered by the District Court on October 26, 1938, which was more than one month after September 22, 1938, the date on which the Act of June 22, 1938, (Chap. 575, 52 Stat. 840-940), amendatory of the Bankruptcy Act of 1898, became effective (52 Stat. 940). The amendatory Act of June 22, 1938, is commonly called the "Chandler Act."[1]

The provisions of the Chandler Act relating to appeals and the appellate jurisdiction of the circuit courts of appeals are, so far as pertinent here, as follows:

Section 24 (52 Stat. 854; 11 U. S. C. A. Sec. 47):

> "SEC. 24. *Jurisdiction of appellate courts.* a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy.

[1] Section 1 of the amendatory Act contains chapters I to VII and X to XIV (both inclusive) of the Bankruptcy Act of 1898, as amended by the amendatory Act. Sections 2 and 3 are not applicable to matters embodied in Section 1. Sections 4 to 7 inclusive deal with the amendments contained in Section 1. To distinguish section numbers in Section 1 from the correspondingly numbered sections of the amendatory Act and of the Bankruptcy Act of 1898 in force prior to the effective date of the amendatory Act, Section 1 of the amendatory Act is herein referred to as the "Chandler Act."

either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *Provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

Section 25 (52 Stat. 855; 11 U. S. C. A. Sec. 48):

"SEC. 25. *Practice on appeals.* a. Appeals under this Act to the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry."

Section 250 (52 Stat. 901; 11 U. S. C. A. Sec. 650):

"SEC. 250. Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

Prior to the Chandler Act amendments, the provisions of the Bankruptcy Act relating to appeals and the appellate jurisdiction of the circuit courts of appeals, so far as pertinent here, read as follows:

Section 24 (11 U. S. C. Sec. 47):

"47. *Same; appellate jurisdiction.* (a) The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeals of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers and dur-

ing their respective terms, are invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.

(b) The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in section 48 of this title) the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said section 48 of this title to be allowed in the discretion of the appellate court.

(c) All appeals under this section shall be taken within thirty days after the judgment, or order, or other matter complained of, has been rendered or entered."

Section 25 (11 U. S. C. Sec. 48):

"48. *Appeals and writs of error.* (a) Appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States and the Court of Appeals of the District of Columbia and to the supreme courts of the Territories in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of $500 or over. Such appeal shall be taken within thirty days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be."

Section 77B (c) (9) (11 U. S. C. A. Sec. 207 (c) (9)):

"(c) Upon approving the petition or answer or at any time thereafter, the judge * * * (9) may allow a reasonable compensation for the services rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and the plan * * * but appeals from orders fix-

ing such allowances may be taken to the Circuit Court of Appeals independently of other appeals in the proceeding and shall be heard summarily."

Section 4 of the amendatory Act of June 22, 1938 (52 Stat. 940), so far as pertinent here, is as follows:

"Except to the extent necessary to give effect to the provisions of section 6 of this amendatory Act, all Acts or parts of Act inconsistent with any provisions of this amendatory Act, are hereby repealed."

Section 6b of the amendatory Act of June 22, 1938 (52 Stat. 940) is as follows:

"Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect; but proceedings in cases then pending to which the provisions of this amendatory Act are not applicable shall be disposed of conformably to the provisions of said Act approved July 1, 1898, and the Acts amendatory thereof and supplementary thereto."

Section 7 of the amendatory Act of June 22, 1938 (52 Stat. 940) is as follows:

"This amendatory Act shall take effect and be in force on and after three months from the date of its approval.

Approved, June 22, 1938."

Obviously, Section 24 of the Chandler Act is inconsistent with former Section 24. It is also clear that the application of Section 24 of the Chandler Act to appeals from orders entered in pending proceedings after the effective date of the amendatory Act is "practicable" within the meaning of Section 6b of the amendatory Act. It follows, therefore, that former Section 24 was *repealed* on the effective date of the amendatory act by Section 4 of the amendatory Act, at least in respect of appeals from orders thereafter entered.

Section 276c of Chapter X of the Chandler Act (52 Stat. 905; 11 U. S. C. A., Sec. 676c) has no application to appeals. Sub-section c (1) and (2) of Section 276 is as follows:

> "c. The provisions of sections 77A and 77B of chapter VIII, as amended, of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act, except that—
>
> (1) if the petition in such proceedings was approved within three months prior to the effective date of this amendatory Act, the provisions of this chapter shall apply in their entirety to such proceedings; and
>
> (2) if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable * * *."

While Section 276c (2) declares that in pending cases the provisions of Chapter X (Corporate Reorganization Section) of the Chandler Act shall apply to the extent that the judge shall deem their application practicable, it seems obvious that this has reference only to the regulations of the proceedings before the District Court[2] after June 22, 1938, the date of the approval of the Act, and not to appeals. Appeals under the Bankruptcy Act, prior to the Chandler Act amendments, were not discretionary with the District Court. They were either taken in the District Court as a matter of right or were allowed

[2] Prior to the Chandler Act amendments, Section 1 (16) (11 U. S. C. Sec. 1 (16)) provided: "'judge' shall mean a judge of a court of bankruptcy, not including the referee." This definition is retained by the Chandler Act (52 Stat. 840; 11 U. S. C. A. Sec. 1 (20)).

by the Court of Appeals in its discretion. (*O'Connor* v. *Mills*, 300 U. S. 26; Cf: *Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160.) This is also true under the Chandler Act amendments. Hence, in respect of appeals, it is immaterial whether or to what extent the District Court might deem the Chandler Act applicable to pending proceedings. Section 276c (2) cannot cover appeals.

Appeals from orders in proceedings under Section 77B of Chapter VIII are not authorized except as provision has been made for appeals by Sections 24 and 25 of Chapter IV of the Bankruptcy Act. (*Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160; *O'Connor* v. *Mills*, 300 U. S. 26). These are the sections which confer appellate jurisdiction upon the circuit courts of appeals and prescribe the mode of review. Moreover, appeals from orders allowing or refusing to allow compensation in proceedings under Section 77B were authorized, not by sub-section (c) (9) of Section 77B but by Section 24(b) (11 U. S. C. 47(b)), to be allowed in the discretion of the appellate court (*Shulman* v. *Hotel Co.*, 301 U. S. 172).[3] Former Sections 24 and 25 were repealed with no other saving clause than that contained in Section 6b of the amendatory Act.

Sections 24 and 25, as amended by the amendatory Act, are Sections 24 and 25 of the Chandler Act. These Sec-

[3] The decisions of the lower federal courts to the same effect are *In Re Wilson-Sheridan Hotel Co.* (C. C. A., 7th Cir.), 86 F. (2d) 898; *Dee* v. *United Exchange Bldg.* (C. C. A. 9th Cir.), 88 F. (2d) 372; *In Re New York Investors* (C. C. A. 2nd Cir.), 79 F. (2d) 179; *In Re Grocery Center* (C C. A. 7th Cir.), 91 F. (2d) 176. In Vol. 3, Gerdes on Corporate Reorganizations (1936), § 1207, p. 1935, the following statement appears:

> "Appeals from orders fixing such allowances may be taken summarily, and independent of other appeals.
>
> This provision does not change the procedure for taking such an appeal; it does not change the substantive rights involved. It merely provides for a summary and separate hearing on the appeal. Authority for the appeal must be found in some other section of the Bankruptcy Act."

tions, the old and the revised, cover the subject of appeals and are inconsistent. In these circumstances, Sections 24 and 25 of the Chandler Act govern appeals from orders to which the application of these Sections is "practicable", and former Sections 24 and 25 govern appeals from orders to which the application of Sections 24 and 25 of the Chandler Act is not "practicable". In other words, only appeals from orders to which Sections 24 and 25 of the Chandler Act are not "applicable" are governed by former Sections 24 and 25. This is the extent, and the full extent, to which Section 6b of the amendatory Act saves former Sections 24 and 25 from outright repeal by Section 4 of the Amendatory Act. Clearly, former Sections 24 and 25 are not continued in force as to orders to which the application of Sections 24 and 25 of the Chandler Act is "practicable" by Section 6b of the amendatory Act, but are repealed by Section 4 of the amendatory Act. In such cases, Section 4, not Section 6b, governs.

Whether former Sections 24 and 25, or Sections 24 and 25 of the Chandler Act, are applicable to an order in a pending proceeding is not a matter of judicial discretion but is a question which must be judicially determined in accordance with the standard of practicability provided by Section 6b of the amendatory Act. Judged by this standard, it is clear that Sections 24 and 25 of the Chandler Act govern the appeal from the order involved in this case.

Respondents apparently contend, first, that the application of Section 24 of the Chandler Act to appeals from orders in pending proceedings entered after the effective date of the amendatory Act is discretionary with the circuit courts of appeals, and, secondly, that the application of Section 24 of the Chandler Act is not "practicable" when the effect of such application is to deprive parties of vested rights.

The answer to the first contention is that the application of Section 24 of the Chandler Act is not discretionary with the circuit courts of appeals; but even if it were otherwise, the Court of Appeals has determined that the appeal from the order involved in this case is governed by the Chandler Act (R. 51).

The answer to the second contention is that no vested right of respondents is impaired or affected by the application of Section 24 of the Chandler Act. Respondents' right to compensation was fixed by the order of October 26, 1938, which was entered more than one month subsequent to the effective date of the amendatory Act. Since the amendatory Act did not take effect until three months after the date of its approval, respondents had ample notice of, and time within which to become familiar with, the provisions of the amendatory Act. There is, therefore, no question here of the retroactive application of the Chandler Act or of disturbing vested rights. Upon a review of this order, respondents would, undoubtedly, be entitled to have their right to compensation determined in accordance with the provision made by Section 77B for the payment of compensation for services rendered in proceedings under that Section. It does not follow, however, that Congress could not change the particular method by which such review might be obtained. Respondents have no vested right in any particular method of review, or, for that matter, in any review at all.

In the case of *Railroad Company* v. *Grant*, 98 U. S. 398, this Court ruled adversely to the contention of the defendant in the court below that, having been entitled to an appeal at the time of the entry of the judgment against it, it was not to be deprived of this right by a later act of Congress increasing the jurisdictional amounts necessary to obtain a review. This Court said at page 401:

"The act of 1879 is undoubtedly prospective in its

> operation. It does not vacate or annul what has been done under the old law. It destroys no vested rights. It does not set aside any judgment already rendered by this court under the jurisdiction conferred by the Revised Statutes when in force. But a party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary."

On this point see also: *Sherman* v. *Grinnell*, 123 U. S. 679; *National Bank of Baltimore* v. *Peters*, 144 U. S. 570.

If Congress could have taken away their right to review entirely, it can hardly be urged by respondents that Congress could not have changed the procedure by which they could have obtained a review. The application of Section 24 of the Chandler Act does not involve respondents' substantive rights. The only question here presented is whether respondents have complied with the statute by which a review could have been obtained.

In holding that the Chandler Act governed the appeal from the order involved in this case, the Court of Appeals rejected these contentions, which were there elaborately argued by respondents. The precise question here presented was also decided by the Court of Appeals for the Second Circuit in the case of *London* v. *O'Dougherty*, 102 F. (2d) 524. In holding that the Chandler Act governed an appeal from an order awarding compensation in proceedings under Section 77B entered after the effective date of the amendatory Act, the Court of Appeals for the Second Circuit said in that case, at page 525:

> "Section 276(c) (2), 11 U. S. C. A. § 676(c) (2), makes the provisions of Chapter 10 (including §250) applicable to such reorganization proceedings 'to the extent that the judge shall deem their application

practicable'; and 'judge' means only a 'judge of a court of bankruptcy', § 1(20), 11 U. S. C. C. § 1(20). Two alternatives are open; the judge may 'deem' application of the provisions of Chapter 10 'practicable' or 'impracticable' as a whole; or he may deal with them singly, the application of this one being 'practicable', and of that, not. Plainly the second is the right interpretation, since the 'practicability' of applying a provision depends upon what it requires; it would generally be impossible to say that all were, or all were not, 'practically' applicable. If the judge is to act upon the provisions singly, it would be quite impermissible for him to declare when it was practicable to apply § 250, which relates to appeals to this court: § 276(c) (2) cannot cover appeals. We therefore turn to § 6(b) of the Chandler Act itself, 11 U. S. C. A. § 1 note, which declares to what proceedings the amendments as a whole are applicable. That indeed is in substantially the same terms as § 276(c) (2), except that the determination is now ours, not the bankruptcy court's. Obviously, it is entirely 'practicable' that § 24a shall determine the 'manner' of taking appeals. Hence we hold that no leave was necessary, the appeal being of right."

By the statement that "the determination is now ours, not the bankruptcy court's", the court did not imply, as respondents argue, that the application of Section 24 of the Chandler Act is discretionary with the circuit courts of appeals. What the court plainly meant by this statement is that a decision as to whether the application of Section 24 of the Chandler Act is "practicable" within the meaning of Section 6b of the amendatory Act must be made by the appellate court and not by the bankruptcy court.

Therefore, it plainly appears that an appeal from the order of October 26, 1938, could have been taken by respondents only in accordance with Sections 24 and 25 of the Chandler Act, which were in force at the time of the entry of this order, and had been in force for more than one month prior thereto.

II.

THE COURT OF APPEALS HAD NO JURISDICTION TO ALLOW AN APPEAL FROM THE ORDER AWARDING COMPENSATION TO RESPONDENTS.

The Court of Appeals holds that Section 250 of the Chandler Act vests exclusively in the circuit courts of appeals appellate jurisdiction over the allowance of appeals from orders making or refusing to make allowances of compensation or reimbursement for expenses. The appellate jurisdiction thus conferred is held to be in addition to that conferred on the circuit courts of appeals by Section 24 of the Chandler Act. In aid of this construction of the Chandler Act, the Court of Appeals applies to Section 250 the maxim *generalia specialibus non derogant* (R. 52).

This maxim is not apposite. Appellate jurisdiction is vested in the circuit courts of appeals by Section 24. This jurisdiction is, in respect of the allowance of appeals, limited to orders involving less than $500. Section 250 does not enlarge, restrict, or in any manner modify, the appellate jurisdiction vested in the circuit courts of appeals by Section 24, or nullify this limitation.

Section 24b provides that the appellate jurisdiction conferred on the circuit courts of appeals by Section 24a "shall be exercised by appeal and in the form and manner of an appeal". Except as otherwise provided by the Bankruptcy Act, appeals from orders of the bankruptcy courts are required to be taken in the District Court, formerly upon the allowance of an appeal,[4] and now, under the

[4] Rules in Bankruptcy, General Order XXVI; Judicial Code, 28 U. S. C. § 230; *O'Connor* v. *Mills*, 300 U. S. 26; *Ross* v. *White* (C. C. A. 6th Cir.) 32 F. (2d) 750, certiorari denied 280 U. S. 584; *McBee* v. *Palmer* (C. C. A. 9th Cir.) 73 F. (2d) 342; *United States* v. *New National Coal & Mining Co.* (C. C. A. 7th Cir.) 72 F. (2d) 168; *Alaska Packers* v. *Pillsbury*, 301 U. S. 174.

Rules of Civil Procedure for the District Courts, by the filing of a notice of appeal.[5] Appeals are required to be taken in the trial court, and an appellate court has no jurisdiction to allow appeals unless authorized to do so by statute (*Credit Co.* v. *Ark. Central Railway*, 128 U. S. 258; *Fowler* v. *Hamill*, 139 U. S. 549). Section 24 confers jurisdictions upon the circuit courts of appeals to allow appeals from orders of the bankruptcy courts and, at the same time, limits this jurisdiction to orders involving less than $500. This result is accomplished by use of a proviso. The proviso excepts from the general operation of Section 24, as a class, orders, decrees or judgments which involve less than $500, and provides a special rule of law to govern this class. The proviso is not limited in its effect to Section 24, or to the liquidation provisions of the Chandler Act (Chapters I-VII), but applies generally to all orders, decrees or judgments of the bankruptcy courts of this class. This clearly appears from the position of the proviso in Section 24. The proviso restrains and modifies the grant of appellate jurisdiction conferred upon the circuit courts of appeals by Section 24a and not the form and manner in which such appellate jurisdiction may be exercised, which Section 24b provides shall in all cases be by appeal. This interpretation follows the general rule for the construction of provisos. This Court said, in *Wayman* v. *Southard*, 10 Wheat. 1, at page 30:

> "The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or, in some measure, to modify the enacting clause."

[5] Rules in Bankruptcy promulgated January 16, 1939, General Order 36; Act of June 19, 1934, 28 U. S. C. A. § 723 b. and c.; Rules of Civil Procedure for the District Courts of the United States, promulgated December 20, 1937 and effective September 16, 1938, Rule 73.

Again in *McDonald* v. *United States*, 279 U. S. 12, this Court said, at pages 20-21:

> "As a general rule, a proviso is intended to take a special case or class of cases out of the operation of the body of the section in which it is found (citing cases). But a proviso is not always limited in its effect to the part of the enactment with which it is immediately associated; it may apply generally to all cases within the meaning of the language used."

In *United States* v. *Babbit*, 1 Black 55, this Court, after stating that it is a well recognized rule of statutory construction that all statutes relating to the same subject matter shall be considered together, said at page 61:

> "We are of opinion that the proviso referred to *is not* limited in its effect to the section where it is found, but that it was affirmed by Congress as an independent proposition, and applies alike to all * * * of this class."

It is a rule of statutory construction that single sentences or single provisions of a statute are not to be selected and construed by themselves, but the whole statute is to be taken together and all of the parts harmonized. Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning. And a construction that creates an inconsistency should be avoided when a reasonable interpretation can be adopted which will not do violence to the plain language of the statute. (*United States* v. *Raynor*, 302 U. S. 540, 547; *Market Co.* v. *Hoffman*, 101 U. S. 112, 115; *Early* v. *Doe*, 16 How. 610, 617; *Pollard* v. *Bailey*, 20 Wall. 520, 525.)

In construing Section 21 of the Bankruptcy Act of 1867, this Court said in the case of *Lamp Chimney Co.* v. *Brass & Copper Co.*, 91 U. S. 656, at page 662:

> "Difficulties perhaps insurmountable would attend the theory of the plaintiffs if the twenty-first section

> of the Bankruptcy Act stood alone; but it does not stand alone; and, being a part of a general system of statutory regulation, it must be read and applied in connection with every other section appertaining to the same feature of the general system, so that each and every section of the act may, if possible, have their due and conjoint effect without repugnancy or inconsistency."

Section 24 of the Chandler Act gives an aggrieved party an absolute right to an appeal from any order, judgment or decree which involves $500 or more, and Section 250 of the Chandler Act should not be so construed as to destroy this right unless the language of that Section permits of no other construction.

In *Talbott* v. *Silver Bow County*, 139 U. S. 438, this Court said, at pages 443-4:

> "Further it is a general rule in the construction of statutes that where in the earlier and declaratory sections the scope and extent of the power and privileges granted are once stated, the character of the grant as thus disclosed controls and interprets all subsequent sections; and it is unnecessary in each subsequent section to restate or use words and expressions which shall fully disclose the extent of those powers and privileges; but these subsequent sections will be understood, (unless there be words of restriction and limitation therein,) as coextensive with and applicable to the scope, and the full scope, and extent of the powers theretofore granted."

And in *United States* v. *Louis. & Nash. R. R.*, 235 U. S. 314, this Court stated, at page 325, that the provision of various sections of an act "being in *pari materia* required harmonious construction and therefore they should not be applied so that one section destroyed the others", and, at page 326, recognized "the rule which requires that a practice which is permitted by one section should not be prohibited upon the theory that it is forbidden by another".

Section 250 of the Chandler Act regulates in some particulars the procedure on appeal by providing that appeals shall be "summarily heard upon the original papers". It does not purport to confer appellate jurisdiction upon the circuit courts of appeals. It does not provide for "the manner" of appeal, but, on the contrary, declares that the manner of appeal has been provided for elsewhere in the Act and that appeals from orders allowing or refusing to allow compensation or reimbursement shall be taken and allowed in the same manner.

The language, "Appeals may be taken * * * from orders making or refusing to make allowances * * * and may * * * be taken to and allowed by the circuit courts of appeals * * *", is sufficiently broad to cover both methods of appeal provided for by Section 24. The words, "taken to and allowed by", alone, are sufficient for this purpose; but even if these words be construed in the language of Section 24 to mean "taken * * upon allowance" by the circuit courts of appeals, effect must still be given to the earlier words of the Section, "Appeals may be taken". Upon either construction, both methods of appeal are included in the language of that Section. Effect must also be given to the words "in the manner and within the time provided for appeals by this Act". The reference here is undoubtedly to Section 24 as to the manner of appeal and to Section 25a as to the time for appeal. There seems to be no doubt of the incorporation of these sections by Section 250.

The construction placed upon Section 250 by the Court of Appeals ignores, in each of these respects, the language of that Section; it also ignores Section 5(b) of the amendatory Act (52 Stat. 940) which provides that: "Sections and subdivision headings shall not be taken to govern or limit the scope of the sections or subdivisions to which they relate."

The Court of Appeals also ignores the construction of subdivision (c) (9) of Section 77 B by the courts. Section 250, being substantially a re-enactment of this subdivision, should receive the same construction. Although subdivision (c) (9) declared that appeals from orders fixing allowances might be "taken to the Circuit Court of Appeals independently of other appeals", it was uniformly held that appeals from these orders could be taken only as provision had been made for appeals by Section 24(b). (*Shulman* v. *Hotel Co.*, 301 U. S. 172; *In re Wilson-Sheridan Hotel Co.* (C. C. A. 7th Cir.) 86 F. (2d) 898; *In re New York Investors* (C. C. A. 2d Cir.) 79 F. (2d) 179; *Dee* v. *United Exchange Bldg.* (C. C. A. 9th Cir.) 88 F. (2d) 372; *In re Grocery Center* (C. C. A. 7th Cir.) 91 F. (2d) 176.) The reference contained in Section 250 to other sections of the Act as to the provisions made for the manner and time of appeal is an express adoption of this construction.

In *London* v. *O'Dougherty*, 102 F. (2d) 524, the Circuit Court of Appeals for the Second Circuit held that Section 250 necessarily incorporates Section 24 (page 525):

> "The question raised by this motion is whether one must secure the leave of this court to appeal from an order awarding him too small an attorney's allowance in a reorganization under the Bankruptcy Act. Section 24a, 11 U. S. C. A. Sec. 47(a), requires leave only in case the order 'involves less than $500', and if it governs this appeal, no leave was therefore necessary, for the appellant asked more than $500. However, appeals from allowances are directly governed by § 250, 11 U. S. C. A. § 650, which provides that 'appeals may be taken in matters of law or fact' from such orders, 'and may, in the manner and within the time provided for appeals by this Act [title], be taken to and allowed by the circuit court of appeals'. This language necessarily incorporates the provisions of § 24a as to the 'manner' of taking an appeal, which need not be 'allowed' by us, but lies as of right."

This same opinion was entertained by the Court of Appeals when it denied petitioner's petition for the allowance of an appeal in Case No. 6822 (R. 49). As stated in its memorandum opinion filed December 19, 1938:

> "Under Section 24(a) of the amended Act (Title 11 U. S. C. A. 47), however, it seems definite that the allowance of an appeal by this court is permissible only when there is less than $500 involved."

The construction of the Chandler Act by the Court of Appeals not only contravenes its positive provisions and the rules of construction which have hereinbefore been mentioned, but also violates its policy and spirit.

Under the Bankruptcy Act of 1898, as originally enacted, Section 24 provided (a) for review of "controversies arising in bankruptcy proceedings" as "in other cases" and (b) for review of "proceedings of the several inferior courts of bankruptcy" by petition to superintend and revise in matters of law (July 1, 1898, c. 541, Sec. 24; 30 Stat. 553). Section 25(a) provided for appeals "in bankruptcy proceedings" from a judgment (1) adjudging or refusing to adjudge a defendant a bankrupt, (2) granting or denying a discharge or (3) allowing or rejecting a debt or claim of $500 or over, to be taken "as in equity cases" within ten days from the date of the judgment (July 1, 1898, c. 541, Sec. 25; 30 Stat. 553).

No uniformity existed: as between these provisions for appellate review, the time for taking appellate proceedings, the method of obtaining appellate review, and the scope of review, all differed. In "controversies arising in bankruptcy", the time, method, and scope of review, as "in other cases", were governed by the provisions of judicial code. (*Mitchell Store Building Co.* v. *Carroll*, 232 U. S. 379, 381.) The time for taking proceedings for review by appeal, as "in other cases", was then six months.

(*Lazarus* v. *Prentice*, 234 U. S. 263; *Globe Bank* v. *Martin*, 236 U. S. 288, affirming *In re Martin* (C. C. A. 6th Cir.) 201 Fed. 31.)[6] In "proceedings" in bankruptcy, review was by petition to superintend and revise and was limited to matters of law, except in the cases enumerated in Section 25(a). No definite time was fixed within which petitions to superintend and revise were required to be filed; but the time for filing these petitions was either fixed by rules adopted by the appellate court, or limited by analogy to the time prescribed for the taking of appeals. (*In re Worcester County* (C. C. A. 1st Cir.) 102 Fed. 808; *Kenova Loan & Trust Co.* v. *Graham* (C. C. A. 4th Cir.) 135 Fed. 717; *Blanchard* v. *Ammons* (C. C. A. 9th Cir.) 183 Fed. 556; *In re Inter-City Trust* (C. C. A. 1st Cir.) 295 Fed. 495; *American Range & Foundry Co.* v. *Mercantile Trust Co.* (C. C. A. 8th Cir.) 7 F. (2d) 417.) Review of "proceedings" in bankruptcy, as to the cases enumerated in Section 25(a), was by appeal, which was required to be taken within ten days.

These sections were amended by the Act of May 27, 1926 (c. 406, Secs. 9, 10; 44 Stat. 664, 665), to provide for review in all cases by appeal and to fix and limit the time for appeal in all cases to thirty days. Appeals in "proceedings" in bankruptcy, except in the cases enumerated in Section 25(a), however, were permitted to be taken only upon allowance by, and in the discretion of, the appellate court. The scope of review remained unchanged. Some progress toward uniformity in matters of review was made by these amendments.[7]

As thus amended, these sections continued in force until

[6] The time for taking appeals in equity cases generally was changed in 1926 to three months. Jud. Code, 28 U. S. C. § 230.

[7] See Report of the Special Committee on Practice in Bankruptcy Matters, Reports of American Bar Association, 1925, Vol. L, pages 485-486; 40 Harvard Law Review at pp. 343-344.

the effective date of the Chandler Act amendments. The evident purpose of the Chandler Act amendments was to give even greater uniformity to the provisions for review.

Section 24a of the Chandler Act eliminates entirely the distinction, as respects the manner of appeal, between orders in "controversies arising in bankruptcy proceedings", and orders in "proceedings of the several inferior courts in bankruptcy", which existed under sub-sections (a) and (b) of former Section 24. The proviso that an appeal from an order which involves less than $500 may be taken only upon an allowance by the appellate court applies both to "proceedings" and to "controversies". (*In re Winton Shirt Corporation* (C. C. A. 3d Cir.) 104 F. (2d) 777: *England* v. *Ducasse* (C. C. A. 9th Cir.) 104 F. (2d) 760.) Section 24(a) also eliminates any differences theretofore existing as to the scope of review by providing for review of both the facts and the law in all cases.

While Section 24 of the Chandler Act does not expressly declare that the allowances of appeals from orders involving less than $500 are discretionary with the circuit courts of appeals, the intent of Section 24 is clearly to permit appeals from orders which involve $500 or more to be taken as of right in the District Court and appeals from orders involving less than $500 to be taken only in the discretion of the circuit court of appeals. In other words, the right of appeal is made to depend entirely upon the amount involved. This is an adoption of the rule which governed appeals from a judgment allowing or rejecting a debt or claim under former Section 25(a). (*In re Winton Shirt Corporation* (C. C. A. 3d Cir.) 104 F. (2d) 777.) Under former Section 25(a) appeals were taken as of right when the judgment allowing or disallowing a debt or claim involved $500 or over; but when less than $500 was involved, the judgment was reviewable only in

the discretion of the circuit court of appeals. The purpose of restricting the right of appeal from a judgment involving a claim or debt of less than $500 was, as stated by Mr. Justice Van Devanter, then sitting as a judge of the Circuit Court of Appeals for the Eighth Circuit, in *Gray* v. *Grand Forks Mercantile Co.*, 138 Fed. 344, at page 347:

> "The purpose of the Congress in restricting the right of appeal was evidently to avoid inconvenience, delay, and expense to claimants and bankrupt estates which would be disproportionate to the amount in controversy."

The same purpose of Congress is evident in the restriction placed upon the right of appeal by Section 24 of the Chandler Act. But, when more than $500 is involved, whether it be a question of allowance of fees, reimbursement for expenses, or some other question, Congress evidently intended that the right of appeal shall be absolute. Nothing contained in Section 250 discloses a contrary or different intent.

In its present opinion, the Court of Appeals holds that it is the intent of Section 250 to retain the distinction between "proceedings" and "controversies" which existed under former Sections 24 and 25 with respect to orders fixing compensation or reimbursement. The principal reason advanced by the Court of Appeals is that this interpretation will further a more expeditious administration, which Congress must be presumed to have intended (R. 58-59). Nowhere in the Chandler Act does there appear an intent to restrict the right of appeal except as to orders which involve less than $500. Surely, if Congress had intended to restrict the right of appeal from orders fixing allowances of compensation or reimbursement, Congress would have experienced no difficulty in expressing this purpose in appropriate and unequivocal language, and pre-

sumably would have done so. The intent of Congress clearly was to make uniform the heterogeneous provisions theretofore existing with respect to appellate review of orders of the bankruptcy courts. Nor does the construction placed upon Section 250 by the Court of Appeals further a more expeditious administration.

Allowances of compensation usually cannot be made until a plan of reorganization is approved, or some other disposition is made of the proceedings, for, until then, an evaluation of the services which have been or which may thereafter be rendered is impossible. When this point is reached, the District Court can and will fix the amount of compensation and terms of payment with due regard to the value of the services, to the ability of the estate or of the reorganized corporation to pay, and to the plan of reorganization, if one has been approved. It is extremely improbable that appeals from orders relating to compensation could impede the proceedings or would be likely to do so.

Certainly, greater danger to the expeditious disposition of these proceedings lies in appeals from other orders which under Section 24 of the Chandler Act may be taken as a matter of right. And if Congress had believed that appeals would vexatiously and unnecessarily obstruct the speedy conclusion of proceedings in the bankruptcy courts, it would not have extended the time for appeal (and for leave to appeal) to forty days, as it did under Section 25a of the Chandler Act (52 Stat. 855, 11 U. S. C. A., Sec. 48a; Cf: 11 U. S. C. Secs. 47(c); 48(a)).

But the danger of delay by appeals from orders relating to compensation and reimbursement, if it exists, is removed by the provision in Section 250, that appeals "shall be summarily heard upon the original papers". Less time is lost in obtaining a summary hearing upon the original papers than in preparing and filing a petition for the allowance

of an appeal and supporting brief, which may not be acted upon for some time, and, if allowed, will result in further delay. Particularly is this true when the scope of review under the Chandler Act has been broadened to include a review of the facts as well as the law on appeals from these orders.

III.

THE COURT OF APPEALS SHOULD HAVE DISMISSED THE APPEAL WHICH IT ALLOWED TO RESPONDENTS FOR WANT OF JURISDICTION TO ENTERTAIN IT.

Compliance with the provisions of Sections 24 and 25 of the Chandler Act was necessary to perfect an appeal from the order of October 26, 1938, and to confer jurisdiction on the Court of Appeals to entertain the appeal. The Court of Appeals has no discretion to entertain an appeal which has not been taken in the manner authorized by law. Compliance with the statute is jurisdictional.[8]

The appeal from the order involved in this case could have been taken only in the District Court, and not having been so taken, the Court of Appeals should have dismissed the attempted appeal for want of jurisdiction to entertain it.[9] The decision with respect to judgments allowing or rejecting a debt or claim under former Section 25(a) are applicable here. Under former Section 25(a) when the

[8] *Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160; *O'Connor* v. *Mills*, 300 U. S. 26; *Shulman* v. *Hotel Co.*, 301 U. S. 172; *Matter of Loving*, 224 U. S. 183; *Coder* v. *Arts*, 213 U. S. 223; *Union Nat. Bank* v. *Lehmann-Higginson Grocery Co.* (C. C. A. 10th Cir.) 82 F. (2d) 969; *McBee* v. *Palmer* (C. C. A. 9th Cir.) 73 F. (2d) 342; *United States* v. *New National Coal & Mining Co.* (C. C. A. 7th Cir.) 72 F. (2d) 168; *Ross* v. *White* (C. C. A. 6th Cir.) 32 F. (2d) 750; *In re Glazer's, Inc.* (C. C. A. 2nd Cir.) 66 F. (2d) 513. See also: *Alaska Packers* v. *Pillsbury*, 301 U. S. 174; *Credit Co.* v. *Ark. Central Railway*, 128 U. S. 258; *Brooks* v. *Norris*, 11 How. 204; *United States* v. *Curry, et al.*, 6 How. 106; *Pierce* v. *Cox*, 9 Wall. 786; *Barrel* v. *Transportation Co.*, 3 Wall 424.

[9] See cases cited in Footnote 8.

judgment involved $500 or more an appeal therefrom could be taken only in the District Court, and when less than $500 only upon allowance by the circuit court of appeals.[10]

Formerly appeals were taken in the District Court only upon allowance,[11] but now appeals are taken under the Rules of Civil Procedure for District Courts by the filing of a notice of appeal in the District Court.[12] Respondents have not followed either procedure: they neither secured the allowance of an appeal in the District Court, nor filed a notice of appeal in the District Court. Respondents, however, argue in this Court, and for the first time, that the procedure followed by them in the Court of Appeals was substantially the equivalent of the filing of the notice of appeal in the District Court, and that their appeal was, therefore, properly taken even though the Court of Appeals had no jurisdiction to allow the appeal. In support of this contention, respondents cite *Crump* v. *Hill*, 104 F. (2d) 36; *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. (2d) 83; *Martin* v. *Clarke*, 105 F. (2d) 685; and *Siegel* v.

[10] *Matter of Loving*, 224 U. S. 183 (Claim over $500: no jurisdiction to review on petition to revise); *In re Glazer's, Inc.* (C. C. A. 2nd Cir.) 66 F. (2d) 513 (Claim over $500: no jurisdiction to review on petition to revise); *Bear, et al.* v. *Liberty Nat. Bank of Roanoke, Va.* (C. C. A. 4th Cir.) 285 Fed. 706 (Claim over $500: petition to revise dismissed); *Union Nat. Bank of Kansas City, Mo.* v. *Neill* (C. C. A. 5th Cir.) 149 Fed. 720 (Claim over $500: petition to revise dismissed); *In re Mueller* (C. C. A. 6th Cir.) 135 Fed. 711 (Claim over $500: petition to revise dismissed); *Abercrombie* v. *Brinkman* (C. C. A. 4th Cir.) 293 Fed. 375 (Claim under $500: petition to revise sustained); *Cook Inlet Coal Fields Co.* v. *Caldwell* (C. C. A. 4th Cir.) 147 Fed. 475 (Claim over $500: reviewable only by appeal); *Gray* v. *Grand Forks Mercantile Co.* (C. C. A. 8th Cir.) 138 Fed. 344 (Claim under $500: appeal dismissed. See also: *England* v. *Ducasse* (C. C. A. 9th Cir.) 104 F. (2d) 760 (Claim over $500: petition for leave to appeal denied).

[11] See Footnote 4.

[12] See Footnote 5.

Margiotta, 102 F. (2d) 525. (Brief for Respondents in Opposition to Petition for Writ of Certiorari, pp. 21-24.)

In the *Crump* case, the Court of Appeals for the Fifth Circuit held that the papers that appellant filed in the District Court in apt time were, in substance, a notice of appeal.

In the *Ainsworth* case, the Court of Appeals for the Third Circuit held that the filing of the record in the circuit court of appeals within 40 days was not jurisdictional, but that the failure to comply with Rule 73 in this respect merely furnished the basis for such action as the circuit court of appeals might deem appropriate.

In the *Martin* case, the Court of Appeals for the Seventh Circuit held that a notice of appeal filed in the District Court in apt time was not invalidated by a misdescription of the judgment which was neither misleading nor prejudicial.

In the *Siegel* case, the Court of Appeals for the Second Circuit assumed, without deciding, that a motion for leave to appeal, filed in the circuit court of appeals, might be taken as the equivalent of a notice of appeal.

The foregoing cases are not authority for the proposition in support of which they are cited by respondents. The *Crump* and *Martin* cases involved mere questions of form and not of substance. In the *Ainsworth* case a notice of appeal was not in any way involved. In the *Siegel* case the assumption made by the court was unnecessary to its decision and cannot be construed as the deliberate judgment of the court.

Rule 73(a) of the Rules of Civil Procedure for District Courts provides:

> "When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judg-

ment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal."

Rule 5(e) provides:

"The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk."

The Rules of Civil Procedure definitely require the filing of the notice of appeal in the District Court and make the filing of the notice of appeal jurisdictional. This requirement is emphasized by the express provision that the failure to take any further steps shall not affect the validity of the appeal, clearly demonstrating that the filing of the notice of appeal in the District Court is the effective act by which the appellate jurisdiction of the circuit court of appeals is invoked. Notification of the filing of the notice of appeal is not jurisdictional. Under Rule 73(b) it is the duty of the clerk to notify the parties to the judgment by mailing copies of the notice of appeal, but it is expressly provided that "his failure so to do does not affect the validity of the appeal". If it should appear that parties to the judgment have not been notified of the filing of the notice of appeal, the appellate court has authority under Rule 73(a) to issue citations, or in some other manner to notify the absent parties. Likewise the appellate court has authority to deal, in an appropriate manner, not inconsistent with the Rules, with all other matters of procedure following the filing of the notice of appeal. This disposes of

respondents' contention that the essential requirement under the Rules of Civil Procedure is the notification to the parties that an appeal has been, or is about to be, taken from a judgment of the District Court. Such notice is not a substitute for the filing of the notice of appeal in the District Court within the time prescribed by law. It is doubtful whether respondents' petition for leave to appeal can be construed as a notice of appeal. But even if it should be so construed, it was not filed in the District Court but in the Court of Appeals (R. 34). To permit a notice of appeal to be filed in a court other than in the District Court in which the judgment was rendered would lead to endless confusion, and certainly such practice is neither contemplated nor authorized by the Rules of Civil Procedure. The Rules—and orderly procedure—require that the notice of appeal be filed in the District Court from whose judgment the appeal is to be taken. It is difficult to imagine, and it is unnecessary to dwell upon, the confusion which would result from the adoption of any other rule.

Review by notice of appeal had been adopted in many of the jurisdictions within the United States prior to December 20, 1937, the date on which this Court promulgated the Rules of Civil Procedure for District Courts of the United States. The jurisdictional requirements for perfecting an appeal in each of these jurisdictions are by no means identical. In addition to the filing of the notice of appeal, some jurisdictions require service of copies of the notice of appeal or written notification of the filing of the notice of appeal, the filing of proof of service of such notice, the approval of an appeal bond, etc, etc., and prescribed the time within which such steps must be taken, all or some of which requirements are held to be jurisdictional. In promulgating Rule 73 this Court decreed that the filing of the notice of appeal should be the sole

jurisdictional requirement, and that further steps in securing the review should be merely procedural. Under Rule 73, the service of a notice, which is a mere matter of procedure, cannot be substituted for the jurisdictional requirement of the filing of the notice of apeal in the District Court. (See *Brown* v. *McConnell*, 124 U. S. 489, 491; *Dodge* v. *Knowles*, 114 U. S. 430, 438.)

In *Laupahoehoe Sugar Co.* v. *Lalakea*, 27 Hawaii Reports 682, the Supreme Court of Hawaii said at page 687:

> "Under our statute, it is the filing in court of the notice of appeal which is the effective appellate act giving this court the power to review the particular decree complained of. The service of a copy of this notice, required by the Act of 1919, is not jurisdictional but is merely a matter of procedure."

It has also been held that a notice of appeal which has been filed in the wrong court is ineffective to invoke the appellate jurisdiction of the reviewing court. (*Rodriguez* v. *Rodriguez*, 32 Porto Rico 618; *Haas* v. *Weinhagen*, 30 Wis. 326; *Mansfield* v. *O'Keefe*, 133 Cal. 362, 65 Pac. 825.)

And the notice of appeal cannot be deemed to be filed until it is delivered at the place where it is to be filed, to the proper officer, and by him received to be kept on file. (Rule 5(e); *Nevatt* v. *Kerby*, 45 Ida. 23, 260 Pac. 432; *W. J. White Co.* v. *Winton*, 41 Cal. App. 693, 183 Pac. 277).

Therefore, whether the Rules of Civil Procedure or the former practice be held to govern an appeal from the order involved in this case, it is clear that the appeal was not perfected.

Respondents argue further that equitable considerations require this Court to sustain the jurisdiction of the Court of Appeals. The point of this argument appears to be that if petitioner had promptly filed an answer to their

petition for leave to appeal, they might still have had time to take the necessary steps to perfect an appeal in the District Court. Reliance is placed upon Rule 38 of the Court of Appeals, which is quoted at length at pp. 3-4 of the brief filed by them in opposition to the granting of the writ herein.

Rule 38 applies to the allowance of appeals discretionary with the Court of Appeals and has no application to appeals which the Court of Appeals has no authority to allow. Further, Rule 38 provides that "respondent may file an answer and if so it must be under oath", and does not require an answer to be filed. The filing of the petition imposed no duty upon this petitioner to answer the petition. The allowance of an appeal is not intended to and does not preclude a later consideration of the right of the appellant to maintain its appeal if and when such right is called into question. (*Bitker* v. *Hotel Duluth Co.*, (C. C. A. 8th Cir.) 87 F. (2d) 207.) And the Court of Appeals should and will inquire into its jurisdiction whenever and however the same may be called in question. (*Swift & Co.* v. *Hoover*, 242 U. S. 107; *M. C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379; *Morris* v. *Gilmer*, 129 U. S. 315; *Defiance Water Co.* v. *Defiance*, 191 U. S. 184; *In re Garneau* (C. C. A. 7th Cir.) 127 Fed. 677; *In re Ettinger* (C. C. A. 2nd Cir.) 76 F. (2d) 741.)

Respondents' petition for leave to appeal was docketed November 25, 1938 (R. 34), which was on the *thirtieth* day following the entry of the order of October 26, 1938. Under Rule 38 respondents were not entitled to docket their petition for leave to appeal until a copy of the petition, assignment of errors, and brief in support of the petition were served upon petitioner and proof of such service filed with the petition. Copies of these papers were not served upon petitioner until the following day,

November 26, 1938 (R. 41). Having themselves violated Rule 38, respondents are hardly in a position to complain of any violation of that Rule by petitioner, even if such complaint were justified, which it is not.

The express provisions of the Chandler Act, or of the Rules of Civil Procedure, cannot be dispensed with upon equitable grounds. This Court, speaking through Mr. Chief Justice Taney, said in the case of *Saltmarsh* v. *Tuthill*, 12 How. 387, at page 389:

> "Nor is there any equitable power in the Circuit Court to stay the execution, upon the ground that a mistake as to the manner or time of removing the case was committed. And it is immaterial in this respect whether it was the mistake of the party or the court. For this court has never deemed the tribunals of the United States authorized to dispense with the express provisions of the acts of Congress regulating appeals and writs of error, upon any equitable ground. No such power is given to them by law. It was so decided in this court in *United States* v. *Curry and others*, 6 How. 113; and *Hogan and others* v. *Ross*, 11 Id. 297."

In the case of *Wingert et al.* v. *Smead et al.*, 70 F. (2d) 351, the Court of Appeals for the Fourth Circuit said at page 352:

> "A petition for rehearing in the above cases urges that technicalities be disregarded and that the appeals be entertained without regard to the fact that the statute which we think applicable has not been complied with. The answer to this is that compliance with the statute is jurisdictional. We have no discretion to entertain appeals which are not taken in accordance with the statute which gives us appellate jurisdiction. The petition for rehearing will be denied."

IV.

THE MERITS OF THE CONTROVERSY BETWEEN THE PETITIONER AND RESPONDENTS ARE NOT BEFORE THIS COURT.

The petition for certiorari and the record filed herein presented only the question of the jurisdiction of the Court of Appeals to allow and entertain the appeal from the order involved in this case. The merits of the controversy which existed between respondents and petitioner in the courts below are not presented to this Court for review. If it were not for the statements and arguments made by respondents in the brief filed by them in opposition to the granting of the writ herein, no statement in regard to the merits of the case would be required. Petitioner does not admit the justice of the allowance made to respondents by the Court of Appeals and states that the conclusions reached by the Court of Appeals are based upon a misapprehension of the facts, particularly with reference to what it termed "the outstanding advantages of the plan" (R. 52) and the services rendered by respondents in connection with these supposed "outstanding advantages".

CONCLUSION.

For the reasons assigned, it is respectfully submitted that the decree of the Court of Appeals should be reversed.

Respectfully submitted,

WALTER A. WADE,
BENJAMIN WHAM,
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Attorneys for Petitioner.

FILE COPY

OCT 7 1939

CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 386

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,

Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE AND JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

SAMUEL E. HIRSCH,
ABRAHAM GREENSPAHN,
JULIAN H. LEVI,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 386

THE DICKINSON INDUSTRIAL SITE, INC.,
A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,

Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE AND JULIAN H. LEVI,
AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE MATTER INVOLVED.

The Statement of the Matter Involved and the Summary in the Petitioner's Application for a Writ of Certiorari, require further clarification.

I.

By Petitioner's own statement, its case is now confined to a single procedural point—how an appeal under the

Chandler Act on a matter of fees and compensation is to be taken. Apparently, Petitioner here concedes that the equities and the merits of the case are thoroughly with the Respondents. Even in the Circuit Court of Appeals, its position was substantially the same:

> "It (the Petitioner) does not seriously dispute the asserted insufficiency of the allowance, but argues that there was not such abuse of discretion as to warrant our disturbing this award" (R. 49).

II.

The creditors' petition for the reorganization of the Albert Dickinson Company filed on June 13, 1934 (R. 1, *et seq.*), the debtor's answer thereto, the subsequent approval of the petition for reorganization (R. 10), the confirmation of the plan of reorganization (R. 16), and the order requiring the filing of petitions for fees and compensation (R. 25), all occurred prior to the effective date of the Chandler Act, which was September 22, 1938. The District Court never made any order declaring the Chandler Act applicable to these proceedings, nor did the Circuit Court of Appeals. No application for such orders was in fact made to either court (R. 49). Petitioner itself when it sought to appeal from the order of the District Court of October 26, 1938 (the order which Respondents also appealed from) filed an application for leave to appeal in the Circuit Court of Appeals on December 5, 1938. This procedure was identical with that followed by Respondents (R. 49).

Petitioner, in quoting from the opinion of the Circuit Court of Appeals denying leave to it to appeal (see petitioner's brief P. 14), ignored the following paragraph in the opinion of the Court:

"If there were any doubt in this respect, however, there is nothing in the petition or assignment of errors which disclosed how or in what manner the court abused its discretion in the fixing and allowance in a reorganization proceeding is to be made in the exercise of discretion by the District Judge, subject to review only when there has been an abuse of such discretion, or an erroneous application of the law. (*In re Tower Bldg. Corp.*, 88 F. (2d) 347). The petition raises no question of law and no showing whatever is made as to any abuse of discretion on the part of the District Court."

III.

Petitioner had full notice of every step taken by Respondent in the course of the appeal. It was served with a copy of the petition for leave to appeal, together with the assignment of errors, at the time that the petition for leave to appeal was filed in the Circuit Court of Appeals (R. 41).

Rule 38 of the Court of Appeals, governing the allowance of discretionary appeals by that Court, provides:

"1. Petitions to this court for leave to appeal from decisions of the District Court in Bankruptcy cases shall be docketed upon the petitioner's making the required deposit for costs and filing an original and three copies of the petition, assignment of errors and brief in support of petition together with proof of service on respondent of copy of each, and with notice of date of filing.

"2. What Petition Shall Contain. The petition shall set forth the facts under oath which shall contain a brief history of the proceedings in the District Court; all important dates; the amount of the indebt-

edness; the estimated value of the assets; the amount and status of the claims of the creditors who are petitioning for permission to appeal; a statement showing when such creditors acquired their claims, whether before or after bankruptcy proceedings were instituted; a copy of any order or memorandum of views announced by the District Judge. The respondent may file an answer and if so it must be under oath setting forth any pertinent facts which bear upon the exercise of a wise discretion on the part of this Court. It may also contain facts, if supported by the record, bearing on petitioner's right to the relief sought. The petition shall be supported by an original typewritten brief, an original and three copies of which shall be filed with the Clerk which shall set forth the statute and decisions as well as other reasons why the petition should be allowed. Unless permitted by this court, only those who are parties in the District Court may file briefs in this court.

"3. Respondent may support its answer by a brief of which he shall file an original and three copies within five days from the filing date designated in said notice, together with proof of service of a copy on petitioner. Briefs in support of or in opposition to such application need not be printed.

"4. The matter shall then be submitted to the court by the clerk. No oral argument by counsel will be heard unless requested by the court."

Petitioners here did not comply with the rule and filed no brief or answer in opposition to the allowance of the appeal by the Court of Appeals, and on December 13, 1938, after the expiration of the time within which Petitioners might have answered the petition for leave to

appeal, the Circuit Court of Appeals allowed Respondents' appeal (R. 42).

Thereafter, Respondents filed their appeal bond as required by the order allowing the appeal (R. 42), which bond was approved by the court, and citation served upon Petitioner (R. 42).

The events above described were not the only notice which Petitioner received about the progress of the appeal. Mr. Walter A. Wade, who has acted as one of the counsel for Petitioner here and throughout the appeal in the Circuit Court of Appeals, was himself a member of the Bondholders' Committee, the Respondent here.

SUMMARY OF ARGUMENT.

Respondents contend that the construction of Section 250 of the Chandler Act (52 Stat. at L. 901; 11 U. S. C. A. 650) adopted by the Circuit Court of Appeals in this case was wholly right within the purview of the statute and in accordance with the intention of Congress. Section 250 is exclusive and requires that appeals from orders making or refusing to make allowances for fees and compensation in reorganization matters are allowable only in the discretion of the Circuit Court of Appeals.

Respondents further contend that in the face of the admitted equities in this record and the fact that the petition for reorganization was approved more than three months prior to the effective date of the Chandler Act that Act cannot and should not be applied to this proceeding if the result of such application would be to deprive Respondents of their remedy against an admitted wrong and injustice.

Respondents further contend that they have substantially complied with Rule 73 of the Rules of Civil Procedure (28 U. S. C. A. following Sec. 723c), which would govern the practice required to be taken by them in the event that the Petitioner here were right in that (1) the Chandler Act governed these proceedings, and (2) under that Act, contrary to the construction adopted by the Circuit Court of Appeals, this appeal could have been taken only as of right.

ARGUMENT.

I.

The Chandler Act invests the Circuit Court of Appeals with jurisdiction to allow an appeal from an order of the Bankruptcy Court allowing or refusing to allow compensation in proceedings for the reorganization of a corporation irrespective of the amount involved.

Petitioner argues that Section 250 of the Chandler Act does not govern the right to an appeal on a fee question in a reorganization proceeding, but that Sections 24(a) and (b) (52 Stat. at L. 854; 11 U. S. C. A. Sec. 47) and 25 (52 Stat. at L. 855; 11 U. S. C. A. Sec. 48) of the General Provisions of the Act governing appeals apply. It reaches this conclusion by assuming that Section 250 is substantially a re-enactment of Sub-section (c) (9) of Section 77(b) (48 Stat. at L. 912; 11 U. S. C. A. 207 (c) (9)). (See Petitioner's Brief, Page 16) This is not the case. Sub-section (c) (9) of Section 77(b) reads as follows:

> "(c). Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him, * * * (9) may allow a reasonable compensation for the services rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and the plan by officers, parties in interest, depositaries, reorganization managers and committees or other representatives of creditors or stockholders, and the attorneys

or agents of any of the foregoing and of the debtor, but appeals from orders fixing such allowances may be taken to the Circuit Court of Appeals independently of other appeals in the proceeding and shall be heard summarily; * * *."

Sections 250 (11 U. S. C. A. Sec. 650) of the Chandler Act reads as follows:

> "Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this title, be **taken to and allowed by** the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers." (emphasis supplied)

Certain important distinctions at once appear, therefore, between Sub-section (c) (9) of Section 77(b) and Section 250 of the Chandler Act:

(1) Section 250 of the Chandler Act is a section which deals with appeals from fee allowances in reorganization proceedings and solely with that question. Sub-section (c) (9) of Section 77(b) provides for the allowance of fees and deals only with the question of appeals by providing that appeals on fees may be heard independently of other appeals.

Shulman v. *Wilson-Sheridan*, 301 U. S. 172.
3 Gerdes, Corporate Reorganizations under Section 77(b) of the Bankruptcy Act (1936), Sec. 1207.

(2) The Circuit Court of Appeals, in holding that Section 250 governed the allowance of the appeal, followed

the express language of Section 250, which provides that the appeal should be "taken to and allowed by" the Circuit Court of Appeals. It must be noted that the words "and allowed by" were inserted by Congress in Section 250 of the Chandler Act and do not appear in Sub-section (c) (9) of Section 77(b), which merely states that the appeal might be "taken to" the Circuit Court of Appeals.

The intention of Congress in inserting the words "and allowed by" in the statute is at once apparent upon an examination of the Chandler Act. Congress knew that in its revision of Sections 24(a) and (b) and 25 of the old Bankruptcy Act, it was abolishing the distinction between appeals in "proceedings" and those in "controversies" in bankruptcy, and that appeals on fees might follow as of right. This Court, however, in *Shulman* v. *Wilson-Sheridan, supra,* had laid down the rule that appeals on fees might not be taken as of right, but only in the discretion of the Circuit Court of Appeals. That rule had been most satisfactory in operation in enabling Circuit Courts of Appeal to reduce the number of unwarranted appeals on the question of the allowance of fees, and it was with this in view that the words "and allowed by" were inserted in the statute.

Petitioner, in an effort to meet the plain language of the statute, has argued that the words "taken to" were inserted in Section 250 for the purpose of providing that appeals involving $500 or more should be as of right. (Petitioner's Brief, Page 15) In other words, Petitioner contends that the words "taken to" in describing an appeal mean that such an appeal must be taken as of right. However, this Court in *Shulman* v. *Wilson-Sheridan, supra,* in passing on Sub-section (c) (9) of Section 77(b), in which the words "taken to" appeared, held that these words did not create an appeal as of right.

No explanation has been made by petitioner as to what the meaning of the words "allowed by the Circuit Court of Appeals" in Section 250 of the Chandler Act could be, other than the plain meaning which the Circuit Court of Appeals in its opinion gave to them, *i. e.*, that the Court should, in its discretion, allow the appeal. (R 51, 58, 59)

Petitioner also contends that the words "in the manner and within the time provided for appeals by this Act" mean that the allowance of appeals upon fee questions must be under Section 24(a) and (b) of the Chandler Act, but here, as the Circuit Court of Appeals observed, the maxim of *generalia specialibus non derogant* controls. The words "and allowed by" appearing in Section 250 of the Chandler Act are the specific mandate of Congress to the effect that an appeal from an order making or refusing to make an allowance of compensation or reimbursement in a reorganization proceeding must be allowed within the discretion of the Circuit Court of Appeals.

The construction of Section 250 adopted by the Circuit Court of Appeals is in accord with sound practice and policy. An appeal on fees, as indicated by the opinion of the Circuit Court of Appeals which Petitioner itself does not attack, primarily involves questions concerning the proper exercise of discretion by the trial court. In many circumstances, an appeal will not lie from an order which is discretionary in the trial court.

Wayne United Gas Co. v. *Owens-Illinois Glass Co.*, 300 U. S. 131.

In Re Gelino's, (C. C. A., 7th Cir.) 51 F. (2d) 875, and cases cited at Page 877. Cert. denied 284 U. S. 659.

It is therefore only by virtue of the statute that an appeal can be taken from the allowance or disallowance

of fees. Sound policy determines, as the Circuit Court of Appeals here decided, that the right to such appeal should rest within the wise discretion of the Circuit Court of Appeals. The Circuit Court of Appeals in this case aptly stated the reasons for this policy in its opinion (R. 58, 59):

> "In reaching our conclusion we were guided by what we believed to be the intention of Congress in enacting the bankruptcy legislation, namely, the desire to expeditiously administer the estates of insolvents. The more recent amendments to the general bankruptcy act, which for the purpose of convenience might be called the reorganization provisions as distinguished from the liquidation sections of the old act, should be similarly construed. Expedition in the reorganization of a debtor is as essential for the protection of creditors as is expedition in liquidations under the old bankruptcy act.
>
> "One of the possible methods of delay is through appeals. While the right to apply for an appeal in bankruptcy cases may be as important as in other suits, experience has demonstrated that there is a possibility for the misuse of the said right of appeal where reorganization of a debtor with many creditors holding valuable assets is about to be effected. Such a situation affords unusual opportunities for one avariciously inclined to create a nuisance value for a claim otherwise lacking in merit.
>
> "In other words, appeals may tie up the liquidation of the estate or the reorganization of the debtor, although the amount involved is relatively small.
>
> "It seems, for this reason, Congress has, in the old act as well as in the amended act, guarded against abuse by providing that the right of appeal shall not

be an absolute one but, in some cases, allowable only in the discretion of the court of appeals.

"Section 250 of the Chandler Act carries such an intention on the part of Congress. In construing this section, it is significant, first, that it deals specifically and exclusively with appeals taken from orders allowing compensation or reimbursements, and second, that it provides expressly for limitation of time within which the appeal may be taken and it also provides that such appeals 'be taken to *and allowed by the Circuit Court of Appeals* independently of other appeals in proceedings and shall be summarily heard upon the original papers.' In other words, Congress, by this section, was dealing specifically with the subject of appeals from an order allowing compensation to those who had helped in the reorganization of the debtor. The last clause squarely indicates the necessity of prompt disposition of the appeal. The clause 'allowed by the Circuit Court of Appeals' can not be ignored. It suggests an intent to avoid frivolous appeals and appeals for purpose of delay. It necessitates the exercise of a discretion by the Circuit Court of Appeals to the end that delays may be avoided. At the same time, it protects the rights of those who are sincerely convinced that an allowance was either inadequate or extravagant. Dealing as it does, specifically with this subject matter, it should be construed as exclusive."

Through the wise exercise of the discretion plainly given to the Circuit Court of Appeals by the statute, that Court can, in unwarranted cases, prevent delay of an appeal by refusing to hear it. The construction of the statute urged by Petitioner not only thwarts the plain intention of Congress, but would, in effect, permit any fee claimant in a bankruptcy case to delay the closing of the estate and to

delay the distribution of the proceeds either in liquidation or reorganization by taking an appeal as of right irrespective of the soundness of his grounds for reversal.

For these reasons, since Section 250 as construed by the Court of Appeals in this case relates only to appeals on questions of fees, the case of *In Re Winton Shirt Corporation*, (C. C. A., 3rd Cir.) 104 F. (2d) 777 cited by Petitioner, is not in conflict with the decision in this case. That case involved an appeal from an order refusing to furnish a transcript and had nothing to do with an appeal involving fees and compensation, which would be governed exclusively by Section 250.

The decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *England* v. *Ducasse*, 104 F. (2d) 760, cited by Petitioner, is likewise not in conflict. That case involved a dispute over a claim, not a dispute over fees, and Section 250 was neither considered by the court nor involved.

The decision of the Circuit Court of Appeals of the Seventh Circuit in the case of *In Re Dickinson Co.*, No. 6822, described by Petitioner in its Brief on Page 14, is likewise not in conflict. It will be observed from the quotation of the opinion of the court made on Page 3 of this brief, that the motion for leave to appeal was there denied on discretionary grounds.

Petitioner also argues that the Circuit Court of Appeals for the Seventh Circuit in the case of *In Re Dickinson Co.*, No. 6842, apparently should have dismissed the appeal there taken rather than affirm it. This Court itself, however, has on a previous occasion indicated that certiorari will not be granted where the only result of so doing would be to direct a Circuit Court of Appeals to dismiss an appeal instead of affirming it.

Smith, et al. v. *Vulcan Iron Works*, 165 U. S. 518.

The case of *London* v. *O'Dougherty*, (C. C. A., 2nd Cir.) 102 F. (2d) 524, also relied upon by Petitioner, will be discussed under a succeeding section of this argument.

II.

The Chandler Act cannot be applied to these proceedings if the result of so doing would be to destroy Respondents' remedy.

Respondents are not here limited to only those grounds selected by the Circuit Court of Appeals in its opinion to sustain its decision.

Helvering v. *Gowran*, 302 U. S. 238, 245.
Alpha Steamship Corp. v. *Cain*, 281 U. S. 642.

Respondents contended in the Circuit Court of Appeals and do here contend that the Chandler Act should not be applied to these proceedings if the effect of such application would be to deny them the right of appeal.

Everything of significance in the proceedings in the District Court occurred under Section 77(b) of Chapter VIII of the Bankruptcy Act of 1898, as amended, and not under the Chandler Act. The filing of the petition for reorganization, the approval of the petition for reorganization, the presentation of the plan of reorganization and its confirmation by the District Court, and the filing of petitions for the allowance of fees were all controlled by and taken under Section 77(b).

The practice followed by Respondents in pursuing their appeal was the exact practice approved by this Court in *Shulman* v. *Wilson-Sheridan*, *supra*, where this Court held that an appeal from an order concerning fees in a pro-

ceeding under Section 77(b) can be taken only by leave of the Court of Appeals. That procedure was followed not only by these Respondents, but by the Petitioner itself. (R. 49)

The Chandler Act which became effective on September 22, 1938 contained the following provisions with respect to its application to pending proceedings under Section 77(b) (52 Stat. at L. 905; 11 U. S. C. A. Sec. 676):

> "Section 276. PROCEEDINGS TO WHICH CHAPTER APPLIES.—
>
> "* * * c. the provisions of sections 206 and 207 of chapter 8, as amended, of this article, shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act, except that—
>
> "(1) if the petition in such proceedings was approved within three months prior to the effective date of this amendatory Act, the provisions of this chapter shall apply in their entirety to such proceedings; and
>
> "(2) if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable; and"

The record in this case shows that the petition for reorganization of The Albert Dickinson Company was approved on September 10, 1934, which, of course, is more than three months prior to the effective date of the Act. (R. 10) The District Court never made any order applying the provisions of the Chandler Act to these proceedings, nor was such an order requested by any one. (R. 49)

Sub-section 2 of Section 276(c), above quoted, provides for the application of the Act to the extent that the judge shall deem its application practicable, and hence speaks of the District Court rather than the Circuit Court of Appeals, which acts through three judges as a court rather than through any single justice. Accordingly, if the application of the Chandler Act is dependent upon the section above quoted, the Act does not apply in this case because of the fact that the District judge never made an order applying the Act to these proceedings.

Petitioner argues further, however, that Section 6(b) of the Amendatory Act (52 Stat. at L. 940) should govern. That Section provides:

> "Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect; but proceedings in cases then pending to which the provisions of this Amendatory Act are not applicable shall be disposed of conformably to the provisions of said Act approved July 1, 1898, and the Acts amendatory thereof and supplementary thereto."

Petitioner by urging that this Section of the law applies to a proceeding under Section 77(b) ignores the first clause of Section 6(b): "except as otherwise provided in this amendatory Act", because Section 276(c), *supra*, is the specific provision governing the application of the Chandler Act to proceedings pending under Section 77(b) at the time of the effective date of the Act. (R. 51)

Petitioner is in further error when it argues that the effect of Section 6(b) is automatically to repeal all provisions of the prior law regarding Appellate proceedings (see Petitioner's brief, page 12). The rule is rather that

under either Section 6(b) or Section 276(c) the test of the application of the Chandler Act is whether it is "practicable" to apply the Act. Petitioner assumes that the word "practicable" used in these circumstances means "possible".

The word "practicable" used in these circumstances does not mean "possible". It means rather "feasible," "fair" and "convenient". The Circuit Court of Appeals for the Third Circuit, in construing the use of this word in connection with the Chandler Act, said (*In re Philadelphia & Reading Coal & Iron Co.*, (C. C. A. 3rd Cir) 104 F. (2d) 126):

> "Practicable, as used in the act, is not synonymous with possible, but means feasible, fair and convenient."

This construction was also adopted by the Circuit Court of Appeals of the Seventh Circuit in the case of *In Re Kenilworth Building Corporation*, 105 F. (2d) 673, at Page 676.

Such a construction was adopted in connection with the amendment to the Bankruptcy Act in 1926. *In re John C. Gasteiger & Co.*, (C. C. A. 2nd Cir.) 25 F. (2) 642:

> "The act of 1926 is an innovation in bankruptcy legislation, the amendments of 1903 (section 18 (11 USCA Sec. 41)) and of 1910 (section 14 (11 USCA Sec. 32)) being both expressly made prospective only. The canon is well settled which interprets statutes prospectively unless the language admits of no other construction (*Chew Heong* v. *U. S.*, 112 U. S.536, 559, 5 S. Ct. 255, 28 L. Ed. 770; *Schwab* v. *Doyle*, 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454; *Fullerton Co.* v. *Northern Pacific R. Co.*, 266 U. S. 435, 45 S. Ct. 143, 69 L. Ed. 367), and we are not sure that the clause, 'so far as practicable and applicable,'

means to go further than to make the amendments 'applicable' to pending proceedings in matters of procedure, though perhaps it may. Even if it does, it gives the courts a wide discretion in determining when it is 'practicable' so to apply it, and by 'practicable' we understand that we must decide whether it *is just to disturb vested rights.*

"• • • The repugnance of most people to such changes in front does not arise alone from the fact that they may disrupt settlements made on the faith of the earlier assurance: The mere inconstancy of a sovereign in respect of what has once been granted is itself a grievance, and seems an injustice to most men. For these reasons it seems to us that it is not 'practicable' to apply retroactively section 64 (b) (7) to cases where the claims have all been filed and the rights all fixed." (Emphasis supplied.)

See also the statement of Judge Learned Hand, *In re Inland Dredging Corporation*, (C. C. A. 2nd Cir.), 61 F. (2d) 765, at 766:

"It has crystallized in the theorem that changes may be made in the remedy, so long as they do not affect the right."

This Court, in promulgating the Rules of Civil Procedure, observed the same concern with respect to actions then pending: (Rule 86)

"They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would

not be feasible or would work injustice, in which event the former procedure applies."

See *Harris* v. *Biszkowicz*, (C. C. A. 8th Cir.), 100 F. (2d) 854.

The General Order of this Court entered on February 13, 1939 promulgating the new General Orders and Rules in Bankruptcy contained the provision:

"It is further ordered that this order shall take effect on Monday, February 13, 1939, and shall govern all proceedings then pending to which its provisions are applicable, except to the extent that in the opinion of the court its application to such proceedings would not be practicable or would work injustice, in which event the General Orders and Forms in Bankruptcy heretofore established shall apply: * * *." 11 U. S. C. A. 53 (May 1939 Sup. Ed.).

The rule laid down in the case of *London* v. *O'Dougherty*, *supra*, is to the effect that the Circuit Court of Appeals itself under Section 6(b) of the Chandler Act is vested with discretion to determine whether the Chandler Act shall be applied to a particular proceeding. The Court there said:

"If the judge is to act upon the provisions singly, it would be quite impermissible for him to declare when it was practicable to apply Section 250, which relates to appeals to this court: Section 276(c) (2) cannot cover appeals. We therefore turn to Section 6(b) of the Chandler Act itself, which declares to what proceedings the amendments as a whole are applicable. That indeed is in substantially the same terms as Section 276(c) (2), except that the determination is now ours, not the bankruptcy court's."

In that case there was no showing of any kind that the application of the Chandler Act would injure the appellant at all. In the case at bar, the situation is much different. Petitioner here admits the injustice meted out to Respondents in the District Court to such an extent that it does not even assign error as to the decision of the Court of Appeals on the merits. The Chandler Act was not even mentioned in these proceedings until January 10, 1939, (R. 43), after Respondents' appeal had been allowed, and the time for any other steps had expired. Furthermore, Petitioner did not comply with Rule 38(c) of the Court of Appeals, which required them, if they wished to oppose the allowance of the appeal, to take steps within five days after the notice for leave to appeal was served upon them on November 26, 1938. (R. 41).

This is the distinction between the situation in *London* v. *O'Dougherty, supra,* where the ruling of the Circuit Court of Appeals on the applicability of the Chandler Act was on a motion for leave to appeal, as distinguished from the present case, where the mention of the statute came after the allowance of the appeal and after the time for Respondents to proceed further had expired. If application of the Chandler Act to these proceedings would now operate to dismiss the appeal, the result would be most unjust and inequitable, particularly when neither the District Court nor the Circuit Court of Appeals, within the time provided for appeals, ever made or was requested to make an order applying the Chandler Act to the proceeding. (R. 49) Until such order was made or requested, Respondents, under the statutes and cases cited, were justified in proceeding under the practice approved by this court in *Shulman* v. *Wilson-Sheridan, supra.*

III.

The steps taken by Respondents were in substantial compliance with the practice required by the Rules of Civil Procedure if the appeal should be taken as of right.

For the purposes of the argument under this section the correctness of both of petitioners' contentions will be assumed, that is, (1) that this appeal is governed by the Chandler Act, and (2) that an appeal on fees involving more than $500 must be taken as of right rather than by leave of the Court of Appeals. Even in these circumstances the appeal was properly taken since the motion of respondent for leave to appeal met all of the requirements for a notice of appeal and should be so treated.

Section 24(b) of the Chandler Act (11 U. S. C. A., Section 47(b)) governs the method of taking an appeal as of right and provides:

> "Such Appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

General Order 36, (11 U. S. C. A. Sec. 53), in Bankruptcy provides:

> "Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in civil actions in the courts of the United States, including the Rules of Civil Procedure for the District Courts of the United States. (28 U. S. C. A. following section 723c.)"

The Rules of Civil Procedure thus made applicable to an appeal in bankruptcy as of right provide (Rule 73):

> "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part

thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal."

The purpose of this rule is simply to require that notice of the appeal be given to the appellee.

The procedure actually carried out by the respondents met and fulfilled every requirement of the rule. The petition for leave to appeal specified that Percy Cowan, Edgar N. Greenebaum, Walter A. Wade and Julian H. Levi, as a Bondholders' Committee, were taking the appeal, (R. 34); it designated the judgment appealed from (R. 34); it named the court to which the appeal was taken (R. 34); accompanying the petition for leave to appeal, an assignment of errors was provided (R. 40, 41); and full notification was given to and acknowledged by Petitioner herein (R. 41).

Of course, the petition and notice were not filed with the Clerk of the District Court but with the Clerk of the Circuit Court of Appeals. This distinction, however, is particularly meaningless in this case, considering that the District Court itself directed that all of the original papers be assembled by the Clerk of the District Court and by him be transmitted to the Court of Appeals. (R. 33, 34) The result, of course, is that all of the papers in the case, whether in the possession of the District Court Clerk or the Clerk of the Circuit Court of Appeals, are now in the custody of the latter. The steps taken by Respondents, therefore, fulfilled the requirements of the Rules of Civil Procedure, which would have governed if the appeal should have been taken as of right.

A liberal construction of the Rules of Civil Procedure is in accordance with their spirit and intention. In the case of *Crump* v. *Hill* (C. C. A. 5th Cir.), 104 F. (2d) 36, Justice Hutcheson determined that the requirement for a notice of appeal was met in including a waiver of service of notice, and the entry of an appearance even though the actual notice of appeal was not filed. The Court there said:

> "We agree with appellant. It is true that Rule 73 does specifically provide that the only thing necessary to be done to perfect an appeal is to file notice thereof with the Clerk, making it the duty of the Clerk to see that notice thereof is served, and that a literal compliance with the Rule requires timely filing of the notice with the Clerk. The reason for the Rule, however, to set the appeal in motion by mere notice without judicial action, makes it quite clear we think that the appellant, when he procured from appellee and filed her waiver of notice, her acceptance of designation, and her entry of appearance, just as effectively started his appeal, as if he had merely filed the notice of appeal with, and left its service to, the Clerk. It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. But it would we think be a hawking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights."

A similar, liberal construction was adopted by the Circuit Court of Appeals for the Third Circuit, in *Ainsworth* v. *Gill Glass & Fixture Co.*, 104 F. (2d) 83.

In the case of *Martin* v. *Clarke* (C. C. A., 7th Cir.), 105 (2d) 685, the Court said:

> "Rule 73(b) of the Supreme Court, 28 U. S. C. A. following Section 723c, provides that 'The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken.' The object of the notice is merely to advise the opposite party that an appeal has been taken from a specific judgment in a particular case; if the notice is plain and explicit in this particular and sufficient in all other respects, it ought not to be declared ineffectual because of some slight mistake in the description of the judgment. Sections 472, 473, 3 Am. Jur. pp. 168 and 169. Courts are liberal in construing the sufficiency of a notice of appeal, and, where it appears from the notice, as in the instant case, that there is sufficient information acquainting appellee as to the judgment appealed from (the appellee not being prejudiced or misled) the mere fact that the designation of plaintiff and defendant was interchanged is no ground for dismissing the appeal. Accordingly, the motion to dismiss is overruled."

In *Siegel* v. *Margiotta* (C. C. A., 2nd Cir), 102 Fed. (2d) 525, the court held that the notice of a motion for leave to appeal was the equivalent of a notice of appeal, saying:

> "The question is whether the appeal papers were served in season, assuming, as we do, that the notice of motion may be taken as the equivalent of a notice of appeal, since no leave was necessary."

If the notice for leave to appeal served by Respondents on November 26, 1938 is likewise taken as the equivalent of a notice of appeal (R. 41), no question exists in this case even under Petitioner's own theory.

CONCLUSION.

The Petitioner here, as in the Circuit Court of Appeals, does not challenge the essential equity and justice of Respondents' position. Their right to an increased allowance is apparently conceded here.

Instead, Petitioner attempts, on a purely technical ground, to defeat an admitted right and promote an admitted error and wrong.

The construction of Section 250 of the Chandler Act urged by Petitioner is contrary to the very language of the statute. Petitioner urges that the Chandler Act be applied to these proceedings retroactively and in circumstances which would work injustice and hardship.

Even if Petitioner's position were sustained on all counts, what was done by Respondents in seeking and perfecting their appeal was a substantial and complete compliance with the requirements of the Rules of Civil Procedure which would then govern the appeal.

It is respectfully submitted, therefore, that the petition for a writ of certiorari be denied.

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Attorneys for Respondents.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 386

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,

Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE and JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934,

Respondents.

BRIEF FOR RESPONDENTS.

SAMUEL E. HIRSCH,
JULIAN H. LEVI,
IRWIN J. ASKOW,
Counsel for Respondents.

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MISCELLANEOUS.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 386

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,

Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE and JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934,

Respondents.

BRIEF FOR RESPONDENTS.

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE.

The Statement of the Case contained in Petitioner's Brief requires further clarification.

(1) By petitioner's own statement, this case is now confined to a single procedural point—how an appeal is to be taken under the amendatory Act of June 22, 1938. The merits of the controversy which existed between respondents and petitioner in the courts below are not only not

presented to this Court for review, but have been finally adjudicated and determined in favor of respondents.

(2) The creditors' petition for the reorganization of The Albert Dickinson Company filed on June 13, 1934 (R. 1, *et. seq.*), the Debtor's answer thereto, the subsequent approval of the petition for reorganization (R. 10), confirmation of the plan of reorganization (R. 16), and the order requiring the filing of petitions for fees and compensation (R. 25), all occurred prior to the effective date of the amendatory Act of June 22, 1938, which was September 22, 1938. The District Court never made an order declaring the amendatory Act applicable to these proceedings, nor did the Circuit Court of Appeals. No application for such an order, in fact, was made to either court (R. 49). Petitioner itself, when it sought to appeal from the order of the District Court of October 26, 1938 (the order which respondents also appealed from) made an application for leave to appeal in the Circuit Court of Appeals on December 5, 1938. This procedure was identical with that followed by respondents (R. 49). The first time that the amendatory Act of June 22, 1938, was mentioned was on January 10, 1939, when the motion to dismiss the appeal was made by petitioner (R. 43).

(3) Petitioner in referring to the ruling of the Circuit Court of Appeals on its appeal, which was docketed as case No. 6822 (Petitioner's Brief, pages 4, 26), ignored the following paragraph in the opinion of the court:

> "If there were any doubt in this respect, however, there is nothing in the petition or assignment of errors which disclosed how or in what manner the court abused its discretion in the fixing and allowance of fees. This court has held that such allowance in a reorganization proceeding is to be made in the exer-

cise of discretion by the District Judge, subject to review only when there has been an abuse of such discretion, or an erroneous application of the law. (*In re Tower Bldg. Corp.*, 88 F. (2d) 347). The petition raises no question of law and no showing whatever is made as to any abuse of discretion on the part of the District Court."

SUMMARY OF ARGUMENT.

I.

Prior to the enactment of the amendatory Act of June 22, 1938, this Court had decisively determined in *Shulman v. Wilson-Sheridan Hotel Co.*, 301 U. S. 172, that an appeal from an order concerning fees in a proceeding under Section 77(b) of Chapter VIII of the Bankruptcy Act of 1898 could be taken only by leave of the Circuit Court of Appeals. This was the precise procedure followed by respondents.

Section 250 of the amendatory Act is the specific enactment of Congress to the effect that appeals on fee questions in reorganization proceedings are to be allowed by the Circuit Court of Appeals, which special provision takes precedence over and controls the general provisions of Sections 24(a) and (b) and 25 of the amendatory Act of June 22, 1938.

The construction of Section 250 of the amendatory Act adopted by the Circuit Court of Appeals in this case is supported by a comparison of the provisions of Section 250 of the amendatory Act with its counterpart, Subsection (c) (9) of Section 77(b).

The construction of Section 250 of the amendatory Act adopted by the Circuit Court of Appeals in this case is in accordance with sound policy and practice, and furthers a more expeditious administration of the Act. Fee claimants in a reorganization proceeding are essentially fidu-

ciaries for the other parties in interest and should not have an unqualified right of appeal.

II.

The amendatory Act of June 22, 1938, which became effective on September 22, 1938 is not applicable to these proceedings. The petition for reorganization of The Albert Dickinson Company was approved more than three months prior to the effective date of the amendatory Act. Accordingly, the provisions of the amendatory Act apply to the proceedings only to the extent that the district judge deems practicable. (Sec. 276-c of the amendatory Act of June 22, 1938).

The district judge never made an order applying the amendatory Act to this proceeding. No such order was ever sought by any party in this case nor was any hearing ever held on the question of the applicability of the amendatory Act.

The question as to whether the amendatory Act should be applied to these proceedings is one of judicial discretion to be exercised with a view of the fairness, feasibility and convenience of the parties, as shown by the record.

The amendatory Act should not be applied retroactively to these proceedings nor should it be applied if the result of so doing would be to destroy respondents' remedy.

III.

The steps taken by respondents in prosecuting and perfecting their appeal substantially complied with Rule 73 of the Rules of Civil Procedure, which would govern the

practice required to be taken by them in the event that petitioner here was right, in its contention that (1) the amendatory Act governed these proceedings, and (2) under that Act, contrary to the construction adopted by the Circuit Court of Appeals, this appeal could have been taken only as of right.

At the time respondents were required to take the appeal, no judge or court had made an order with respect to the applicability of the amendatory Act of June 22, 1938 to these proceedings. This court had not promulgated the new Rules in Bankruptcy, and there was grave doubt as to whether the new Rules of Civil Procedure or the former Equity Practice prescribed the proper procedure as to an appeal. (*In re Schuehm Realty Co.*, C. C. A. 3 Cir., 100 F. (2) 532.)

No authoritative judicial construction of either the amendatory Act or the Rules of Civil Procedure had occurred. Under the circumstances of this case, the petition to revise filed by respondents should be treated as an appeal. (*Taylor* v. *Voss*, 271 U. S. 176.)

IV.

The merits of the controversy between petitioner and respondents have been adjudicated in favor of respondents. The failure of petitioner to present the question of the merits of this case to this Court for review (see petitioner's brief, pages 2, 9 and 39), leaves the adjudication by the Circuit Court of Appeals of respondents' right to receive increased compensation final and binding upon all parties.

ARGUMENT.

I.

The amendatory Act of June 22, 1938 invests the Circuit Court of Appeals with jurisdiction to allow an appeal from an order of the District Court allowing or refusing to allow compensation in proceedings for the reorganization of a corporation irrespective of the amount involved.

The Circuit Court of Appeals in this case held that the appeal by respondents from the order of October 26th, 1938 was properly taken by leave of the Circuit Court of Appeals rather than by the filing of a notice of appeal in the District Court (R. 51).

The order of October 26th, 1938 related solely to the allowance of fees, expenses and compensation to various parties for services rendered in connection with the reorganization of The Albert Dickinson Company (R. 26).

The Circuit Court of Appeals reached its conclusions through a construction of Section 250 of the amendatory Act of June 22nd, 1938. (52 Stat. 901; 11 U. S. C. A. 650.)

An analysis of that section of the amendatory Act is best commenced by an examination of its counterpart in the earlier statute which is Sub-section (c) (9) of Section 77(b). (48 Stat. 912; 11 U. S. C. A. Sec. 207(c)(9).) That section reads as follows:

> "(c). Upon approving the petition or answer or at any time thereafter, the judge, in addition to the juris-

diction and powers elsewhere in this section conferred upon him, * * * (9) may allow a reasonable compensation for the services rendered and reimbursement for the actual and necessary expenses incurred in connection with the proceeding and the plan by officers, parties in interest, depositaries, reorganization managers and committees or other representatives of creditors or stockholders, and the attorneys or agents of any of the foregoing and of the debtor, but appeals from orders fixing such allowances may be taken to the Circuit Court of Appeals independently of other appeals in the proceedings and shall be heard summarily; * * *."

Section 250 (11 U. S. C. A. Sec. 650) of the amendatory Act reads as follows:

> "Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this title, be **taken to and allowed by** the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers." (Emphasis supplied.)

Certain important distinctions at once appear between Sub-section (c) (9) of Section 77(b) and Section 250 of the Chandler Act:

(1) Congress in enacting Section 250 of the amendatory Act deliberately changed one essential phrase in the Act by inserting the words "and allowed by." The phrase in Section 77(b) reads: "but appeals from orders fixing such allowances may be taken to the Circuit Court of Appeals." The phrase in the amendatory Act reads: "Ap-

peals may * * * be taken to and allowed by the circuit court of appeals."

(2) Congress in dealing with the question of appeals on fees in reorganization proceedings enacted a section which now deals exclusively and solely with that question. Subsection (c) (9) of Section 77(b) provided for the allowance of fees and only dealt with the question of appeals in providing that appeals might be heard independently of other appeals.

Shulman v. *Wilson-Sheridan*, 301 U. S. 172;

3 Gerdes on Corporate Reorganizations (1936) § 1207.

The intention of Congress in inserting the words "and allowed by" in the Statute and in specially providing for appeals under the amendatory Act is at once apparent upon an examination of the Act. In the revisions of Sections 24(a) and (b) (11 U. S. C. A. Sec. 47) and 25 (11 U. S. C. A. Sec. 48) of the Bankruptcy Act, Congress was abolishing the distinction between appeals in "proceedings" and those in "controversies" in bankruptcy and in their stead substituted a test solely of the amount involved. This court in *Shulman* v. *Wilson-Sheridan, supra*, had, however, laid down the rule that appeals on fees might not be taken as of right, but only in the discretion of the Circuit Court of Appeals. That rule had been most satisfactory in operation in enabling Circuit Courts of Appeal to reduce the number of unwarranted appeals on the question of the allowance of fees, and it was with this in view that the words "and allowed by" were inserted in the Statute, as well as the entire subject of appeals in reorganization proceedings, being specially dealt with in the amendatory Act.

The contrast between the provisions of Section 77(b) and those of the amendatory Act relating to appeals on fee questions is, of course, important.

In *Brewster* v. *Gage*, 280 U. S. 327, at 337, this Court said:

> "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."

In this case, there is that deliberate selection of language by Congress and that deliberate difference in treatment of the subject which would again indicate that Congress intended to alter the statutory provisions, so as to preserve in operation the rule laid down by this court in *Shulman* v. *Sheridan-Wilson, supra.*

Petitioner, in an effort to meet the plain language of the Statute and the construction adopted by the Circuit Court of Appeals, has argued that the words "taken to" were inserted in Section 250 for the purpose of providing that appeals on fee questions involving $500 or more should be taken as of right and that appeals involving less than that amount should be granted only by leave of the Appellate Court (Petitioner's Brief, page 24). In other words, petitioner contends that the words "taken to" in describing an appeal mean that such an appeal must be taken as of right. This court, however, in *Shulman* v. *Wilson-Sheridan, supra*, in passing on Sub-section (c) (9) of Section 77(b), in which the words "taken to" appeared, held that these words did not create or describe an appeal as of right.

No other explanation has been made by petitioner as to what the meaning of the words "allowed by the Circuit Court of Appeals" in Section 250 of the Chandler Act

could be, other than the plain meaning which the Circuit Court of Appeals in its opinion gave to them, that is, that the Circuit Court of Appeals may, in its discretion, allow the appeal (R. 51, 59).

Petitioner also contends that the words "in the manner and within the time provided for appeals by this Act" mean that the allowance of appeals upon fee questions must be under Section 24(a) and (b) of the Chandler Act.

The difficulty with petitioner's position here is that Congress in enacting Section 250 of the amendatory Act clearly intended that the provisions of Section 250 should take precedence in fee cases over the other sections of the amendatory Act dealing with appellate jurisdiction. Congress, for instance, provided that appeals on fee questions should be "summarily heard upon the original papers," heard "independently of other appeals in the proceeding" and "taken to and allowed by the Circuit Court of Appeals."

Petitioner itself invoked one of the special features of this section when it procured an order to the effect that the Clerk of the District Court transmit all of the "original papers" to the Circuit Court of Appeals and also that the Circuit Court of Appeals hear the case on the original papers without a printed transcript (R. 33, 67).

In other words, Section 250 of the amendatory Act is special legislation insofar as appellate proceedings on fee questions are concerned and overrides the provisions of Sections 24(a) and (b) and 25 of the amendatory Act to the extent that those provisions are inconsistent with Section 250. As the Circuit Court of Appeals aptly observed, the maxim of *generalia specialibus non derogant* controls, in that Congress has by specific mandate directed that appeals on fee questions in a reorganization proceeding

should be allowed by the Circuit Court of Appeals. The view of the Circuit Court of Appeals is sustained by ample authority.

In the case of *State of Missouri* v. *John T. Ross, Trustee*, 299 U. S. 72, this court, in construing Section 64(b) of the Bankruptcy Act with respect to the priority of taxes, held that the segregation of such items in a specific class gave to them precedence over items awarded priority in other paragraphs and sections of the Act.

The Court there said at page 76:

> "But this conclusion must be rejected; for conceding that taxes are debts, they are carved out of the general provisions of paragraph (7) and put in a special class under paragraph (6), and thus fall within the rule that special provisions prevail over general ones which, in the absence of the special provisions, would control. *Townsend* v. *Little*, 109 U. S. 504, 512, 27 L. Ed. 1012, 1015, 3 S. Ct. 357; *McKee* v. *United States*, 164 U. S. 287, 294, 41 L. ed. 437, 439, 17 S. Ct. 92; *Kepner* v. *United States*, 195 U. S. 100, 125, 49 L. ed. 114, 122, 24 S. Ct. 797, 1 Ann. Cas. 655; *Re Rouse, H. & Co.*, (C. C. A. 7th) 91 F. 96, 101, 1 Am. Bankr. Rep. 234; *Re Slomka*, (C. C. A. 2d) 122 F. 630, 631, 9 Am. Bankr. Rep. 635."

Likewise, in the case at bar, the special provisions governing the taking and allowance of appeals on fee questions in reorganization proceedings take precedence over the general provisions of Section 24(a) and (b) and 25 of the amendatory Act.

In *D. Ginsberg & Sons, Inc.* v. *Joseph Popkin*, 285 U. S. 204, at 208, the Court said:

"General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *United States* v. *Chase*, 135 U. S. 255, 260, 34 L. ed. 117, 119, 10 S. Ct. 756, 8 Am. Crim. Rep. 649. Specific terms prevail over the general in the same or another statute which otherwise might be controlling."

Baltimore National Bank v. *State Tax Commission of Maryland*, 297 U. S. 209, 215:

"It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling."

The construction of Section 250 adopted by the Circuit Court of Appeals is in accord with sound practice and policy. An appeal on fees, as indicated by the opinion of the Circuit Court of Appeals, which petitioner itself does not attack, primarily involves questions concerning the proper exercise of discretion by the trial court. In many circumstances, an appeal will not lie from an order which is discretionary in the trial court.

Wayne United Gas Co. v. *Owens-Illinois Glass Co.*, 300 U. S. 131;

In re Gelino's, (C. C. A. 7th Cir.) 51 F. (2d) 875, and cases cited at page 877, Cert. denied 284 U. S. 659.

It is therefore only by virtue of the statute that an appeal can be taken from the allowance or disallowance of fees. Sound policy determined, as the Circuit Court of Appeals here decided, that the right to such appeal should rest within the wise discretion of the Circuit Court of Ap-

peals. The Circuit Court of Appeals in this case aptly stated the reasons for this policy in its opinion[1] (R. 58, 59).

There is, in respondents' view, a particularly delicate relationship between any fee claimant in a reorganization proceeding and the other parties in interest in the pro-

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[1] "In reaching our conclusion we were guided by what we believed to be the intention of Congress in enacting the bankruptcy legislation, namely, the desire to expeditiously administer the estates of insolvents. The more recent amendments to the general bankruptcy act, which for the purpose of convenience might be called the reorganization provisions as distinguished from the liquidation sections of the old act, should be similarly construed. Expedition in the reorganization of a debtor is as essential for the protection of creditors as is expedition in liquidations under the old bankruptcy act.

"One of the possible methods of delay is through appeals. While the right to apply for an appeal in bankruptcy cases may be as important as in other suits, experience has demonstrated that there is a possibility for the misuse of the said right of appeal where reorganization of a debtor with many creditors holding valuable assets is about to be effected. Such a situation affords unusual opportunities for one avariciously inclined to create a nuisance value for a claim otherwise lacking in merit.

"In other words, appeals may tie up the liquidation of the estate or the reorganization of the debtor, although the amount involved is relatively small.

"It seems, for this reason, Congress has, in the old act as well as in the amended act, guarded against abuse by providing that the right of appeal shall not be an absolute one but, in some cases, allowable only in the discretion of the court of appeals.

"Section 250 of the Chandler Act carries such an intention on the part of Congress. In construing this section, it is significant, first, that it deals specifically and exclusively with appeals taken from orders allowing compensation or reimbursements, and second, that it provides expressly for limitation of time within which the appeal may be taken and it also provides that such appeals 'be taken

ceeding.[2] Petitioner, in effect, argues that such a claimant is to be considered in the same light as any other litigant appearing in the reorganization proceeding. (See Petitioner's Brief, pages 29 and 30.) Respondents do not share that view. They feel rather that the status of an attorney or fee claimant in a reorganization proceeding is that of a fiduciary to the rights of the creditors and stockholders of the debtor, who should not be permitted to appeal without first making such a *prima facie* case as would justify the Circuit Court of Appeals, in the exercise of sound judicial discretion, to permit him to proceed.

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to *and allowed by the Circuit Court of Appeals* independently of other appeals in proceedings and shall be summarily heard upon the original papers.' In other words, Congress, by this section, was dealing specifically with the subject of appeals from an order allowing compensation to those who had helped in the reorganization of the debtor. The last clause squarely indicates the necessity of prompt disposition of the appeal. The clause 'allowed by the Circuit Court of Appeals' can not be ignored. It suggests an intent to avoid frivolous appeals and appeals for purpose of delay. It necessitates the exercise of a discretion by the Circuit Court of Appeals to the end that delays may be avoided. At the same time, it protects the rights of those who are sincerely convinced that an allowance was either inadequate or extravagant. Dealing as it does, specifically with this subject-matter, it should be construed as exclusive."

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[2] *Realty Associates Securities Corporation* v. *O'Connor*, 295 U. S. 295;
In Re New York Investors, Inc., (C. C. A. 2nd Cir.) 79 F. (2d) 182;
Newton v. *Consolidated Gas Company of New York*, 259 U. S. 101;
In re Middle West Utilities Co., (D. C., N. D. Ill., E. D.) 17 Fed. Supp. 359, at 373;
In re Gilbert, 276 U. S. 294;
In re National Department Stores, Inc., (C. C. A. 3rd Cir.) 93 F. (2d) 123.

Since the doctrine of this case as laid down by the Circuit Court of Appeals is restricted solely to appeals relating to fees and compensation in reorganization proceedings, the case of *In re Winton Shirt Corporation*, (C. C. A. 3rd Cir.) 104 F. (2d) 777, (relating to a refusal to furnish a transcript), and the case of *England* v. *Ducasse*, (C. C. A. 9th Cir.) 104 F. (2d) 760 (relating to a dispute over a claim, not a dispute over fees), are without application to the problem before the court.

II.

The provisions of the Chandler Act are not applicable to these proceedings.

(a) *The amendatory Act of June 22, 1938 cannot be applied to these proceedings since no order was ever made by the District Judge applying the provisions of the amendatory Act to this case as required by Section 276-c of the amendatory Act.*

The petition for reorganization of The Albert Dickinson Company was approved on September 10, 1934 (R. 10).

The amendatory Act of June 22, 1938 by its terms became effective on September 22, 1938 and contained the following provisions with respect to its application to proceedings then pending under Section 77(b) (52 Stat. 905; 11 U. S. C. A. Sec. 676):

> "Sec. 276-c. The provisions of sections 77A and 77B of chapter VIII, as amended, of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, shall continue in full force and effect with respect to proceedings pending under those sections upon the effective date of this amendatory Act, except that—

(1) if the petition in such proceedings was approved within three months prior to the effective date of this amendatory Act, the provisions of this chapter shall apply in their entirety to such proceedings; and

(2) if the petition in such proceedings was approved more than three months before the effective date of this amendatory Act, the provisions of this chapter shall apply to such proceedings to the extent that the judge shall deem their application practicable; * * *."

Since the petition for reorganization of The Albert Dickinson Company was approved more than three months prior to the effective date of the amendatory Act (R. 10), the provisions of the amendatory Act as provided in Section 276-c (2) thereof are to apply to the proceedings only "to the extent that the judge shall deem their application practicable." The District Judge never made an order applying the provisions of the Chandler Act to these proceedings, and in fact no such order was ever requested by any party in either the Circuit Court of Appeals or in the District Court (R. 49).

The Circuit Court of Appeals, in its opinion, however, determined that the provisions of the amendatory Act governed the appeal (R. 51). This determination by the Circuit Court of Appeals must be considered in two lights:

First: Since the Circuit Court of Appeals decided that the procedure adopted by these respondents in taking their appeal was proper under the provisions of the amendatory Act (R. 51) the decision of the Circuit Court of Appeals to apply the amendatory Act did not in the view of that court destroy respondents' remedy, or in any manner affect it. Respondents also contended in the Circuit Court of Appeals, and do here contend, that by its own terms the amendatory Act is not applicable to these proceedings

if the result of such application would be the destruction of their remedy. Since the decision of the Circuit Court of Appeals is to the effect that the procedure adopted by respondents in taking their appeal (*Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172) was proper under the provisions of Section 250 of the amendatory Act itself, the effect of the decision of the Circuit Court of Appeals in this case was to leave respondents' remedy unchanged.

Second: Respondents do not believe that the Circuit Court of Appeals had jurisdiction to determine whether the amendatory Act should be applicable or not.

Sub-section 2 of Section 276-c above quoted provides for the application of the amendatory Act to the extent that the *judge* shall deem its application practicable, and hence apparently speaks of the District Court rather than the Circuit Court of Appeals, which acts through three judges as a court, rather than through any single justice. In addition, the word "judge" is defined in Sub-section 20 of Section 1 of the amendatory Act (52 Stat. 840) itself as follows:

> "'Judge' shall mean a judge of a court of bankruptcy, not including the referee."

The Circuit Court of Appeals is not a court of bankruptcy:

> "'Courts of bankruptcy' shall include the district courts of the United States and of the Territories and possessions to which this title is or may hereafter be applicable, • • •"
>
> Section 1, Sub-section 10 of the amendatory Act of June 22, 1938; 52 Stat. 840.

Consequently, if the application of the amendatory Act is dependent upon the sections above quoted, that Act does

not apply to this case, since no order was ever made by the District Judge (the judge of the court of bankruptcy) applying the amendatory Act to these proceedings.

Petitioner, in an effort to meet this situation argues that Sections 4 and 6(b) of the amendatory Act (52 Stat. 940) govern Appellate procedure. (See Petitioner's brief, pages 14 and 15.) These sections provide as follows:

> "Sec. 4—* * * Except to the extent necessary to give effect to the provisions of Section 6 of this amendatory Act, all Acts or parts of Acts inconsistent with any provisions of this amendatory Act are hereby repealed."
>
> "Sec. 6(b)—Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings, so far as practicable in cases pending when it takes effect; but proceedings in cases then pending to which the provisions of this amendatory Act are not applicable shall be disposed of conformably to the provisions of said Act approved July 1, 1898, and the Acts amendatory thereof and supplementary thereto."

Petitioner by urging that these sections apply to a proceeding under Section 77(b), ignores the first clause of Section 6(b)—

> "Except as otherwise provided in this amendatory Act * * *."

Section 276-c, *supra*, is the specific provision governing the applicability of the amendatory Act to proceedings pending under Section 77(b) at the time of the effective date of the Act (R. 51).

Petitioner is in further error when it argues that the effect of Sections 4 and 6(b) of the amendatory Act is to

automatically repeal all provisions of the prior law regulating appellate proceedings.

Repeals by implications are not favored in the law,[3] and moreover, the express language of both Sections 6(b) and 276(c) of the amendatory Act provides (1) that the Act is applied only so far as "practicable," and (2) that as to those cases to which the provision of the amendatory Act shall not be found applicable, the provisions of the earlier Act shall apply.

(b) *The question as to whether the amendatory Act of June 22, 1938 should be applied to these proceedings is one of judicial discretion to be exercised with the view of fairness, feasibility and convenience of the parties, as shown by the record.*

The test of "practicable" used in these circumstances does not mean "possible" as petitioner contends. It means rather "feasible," "fair" and "convenient." It requires that the court exercise a judicial discretion to that end (compare petitioner's brief at page 16).

The report of the Senate Judiciary Committee on the amendatory Act discloses that it was the intention of Congress to vest a full discretion in the District Judge. Senate Report No. 1916, 75th Cong. 3rd Sess.[4]

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[3] *U. S.* v. *Burroughs*, 289 U. S. 159, 164;
Frost v. *Wenie*, 157 U. S. 46;
U. S. v. *Healey*, 160 U. S. 136;
U. S. v. *Greathouse*, 166 U. S. 601;
Posadas v. *National City Bank*, 296 U. S. 497.

[4] On Page 39 of the report of the Senate Committee on Judiciary (May 27, 1938) in speaking of the effect of Section 276 of Chapter X, it is stated:

"* * * As to cases wherein the petition was approved more than three months before the effective

The Circuit Court of Appeals for the Third Circuit in construing the word "practicable" in connection with the amendatory Act, said in *Philadelphia & Reading Coal & Iron Co.*, (C. C. A. 3 Cir.) 105 F. (2d) 354:

> "The statutory provisions upon which the appellant relies are contained in Chap. X of the Bankruptcy Act. The application of these provisions to a proceeding such as the present one which was commenced under Sec. 77B is within the sound discretion of the district judge. They are to be invoked only if he shall deem their application to be practicable, that is feasible, fair and convenient, in the light of all that has previously happened in the pending proceeding. *In re Old Algiers, Inc.*, 2 Cir., 100 F. 2d 374; *In re Philadelphia & Reading Coal & Iron Co.*, 3 Cir., 104 F. 2d 126. The applicability of the several provisions of Chap. X is to be considered individually and not in whole. *London* v. *O'Dougherty*, 2 Cir. 102 F. 2d 524."

In a prior decision in the same case (104 F. (2d) 126), the Court said, at page 127:

> "The report of the Senate Committee on the Judiciary upon the bill discloses that it was the intention of Congress to vest a full discretion in this matter in the district judge. Senate Report No. 1916, 75th Cong. 3rd Sess.
>
> "It follows that the provisions of Section 156 are not to be applied to a prior proceeding unless the district judge, in the exercise of the discretion which the law has vested in him, deems their application practicable. Practicable, as used in the act, is not synony-

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date of this Act, the Judge is given full discretion to apply such provisions of this Chapter as are practicable."

mous with possible, but means feasible, fair and convenient. *In re Old Algiers*, 2 Cir., 100 F. 2d 374; *Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co.* v. *Indianapolis, Columbus & Southern Traction Co.*, 169 Ind. 634, 81 N. E. 487; 3 Words and Phrases, Second Series, p. 1109. The fact that in every case it would be possible to appoint a trustee is immaterial."

In the case of *In re Old Algiers, Inc.*, 100 F. (2d) 374 (C. C. A. 2nd, 1938), the Court said, at page 375:

"In our opinion the test of practicability should be whether the new provisions, for aught that has happened in the pending proceedings, can be applied as fairly and conveniently as they could be had the proceeding been started within three months of the effective date of the Act—in which event the new provisions would indubitably control by reason of section 276(c) (1), 11 USCA Sec. 676 (c) (1). If, for example, administration had progressed so far that the assets of the estate had been distributed by way of dividends to creditors, it would be neither fair nor convenient to require creditors to return the dividends in order that fees might be paid pursuant to section 246; it would not be 'practicable' to apply the new provision. But where, as in the present case, the trustee still has funds in hand and the time for proving claims of creditors has not expired, fees to which the appellants may be entitled can apparently be as conveniently and as justly paid out of the estate as if the proceeding had been begun after June 22, 1938. Under such circumstances, it would seem to be 'practicable' to apply the amendatory provisions."

Judge Peters, in the case of *In Re Brown Co.*, 26 Fed. Supp. 843 (D. C. D. Me. S. D.) said at page 844:

"As this proceeding was begun on a petition approved more than three months before the effective

date of the recent Amendment to the Bankruptcy Act, it is apparent that the court must determine the extent to which a proposed application of any provisions of Chapter 10 is practicable before any such provisions can apply. Sec. 276 c (2), 11 U.S.C.A. Sec. 676(c) (2).

"The situation of this proceeding is such, I think, that it is *convenient* and *not unfair to any interest* for the Commission to file its appearance so that it may receive all notices, be heard in all matters arising, as other parties are heard, and deemed an intervenor in respect of all matters in the proceeding." (Emphasis supplied.)

The Circuit Court of Appeals for the Seventh Circuit in the matter of *In Re Kenilworth Building Corp.*, 105 Fed. (2d) 673, at page 676, said:

"It is first necessary to consider the meaning of 'practicable' as used in Section 276(c) (2) of the Chandler Act. The Circuit Court of Appeals for the Third Circuit construes the word 'practicable' as follows: 'Practicable * * * is not synonymous with possible, but means feasible, fair and convenient.' In view of what had transpired prior to the ruling of the court at the time of the report on acceptances, it was not 'feasible, fair and convenient' to apply Section 198. Up to that time the conduct of the proceedings in respect to the adoption of the plan obviously was on the assumption that all claims filed and allowed had to be considered in determining whether creditors holding two-thirds in amount of claims allowed were in favor of acceptance.

"* * * It would not be practicable to apply a provision of the Chandler Act if it authorizes confirmation of a proposed plan in case the plan is approved

by creditors holding two-thirds in amount of about $74,000 of claims when the reorganization proceeding had been conducted on the assumption, and upon the understanding of all interested parties, that the proposed plan could not be confirmed by the court unless it should be approved by the holders of two-thirds in amount of $112,000.

"The application of the section of the Chandler Act brought about a result which, upon the basis of the written acceptances, it was impossible to attain under Section 77B; and since it was not invoked until after the plan had been submitted to holders of claims and until it was too late for holders of claims which had been filed by the indenture trustee to refile their claims, the result was to prevent their participation in the consideration of the plan. The application of Section 198 at the stage of the proceedings at which it was invoked could be construed 'practicable' only in the sense that it afforded a strictly formal procedural means to secure acceptance of the plan. But in view of the stage of progress in the reorganization proceedings the application was impracticable in any substantial sense since it could not be said to be adapted to the effectuation of the true purposes of the reorganization proceeding."

The case of *Pittsburgh C. C. & St. L. Railroad Co.* v. *Indianapolis C. & S. Traction Co.*, 169 Ind. 634, 81 N. E. 478, 488, hinged upon the construction of the word "practicable", as used in the Indiana statutes. The Court, in discussing the meaning of the word, said:[5]

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[5]This definition has been accepted in many other decisions:

Wilcox v. *The Supreme Council of Royal Arcanum*, 66 Misc. 253; 123 N. Y. S. 83, 86;

"The word practicable, as used in the statute, we think should be given its usual and ordinary meaning as indicated by its context. Plainly it is not synonymous with 'possible.' A thing practicable must necessarily be possible, but a thing may be possible that is not practicable. * * * The English Law Dictionary defines the word 'as possible of reasonable performance.'

"The phrase 'if the court shall find it practicable' implies a legal discretion, and the exercise of judgment based upon the whole evidence of all the facts that affect the question of practicability within the usual and ordinary sense of the word. The question therefore depends upon the circumstances of each particular case."

In other words, the courts of this country, in construing the meaning of the word "practicable," have uniformly held that the word imparts the requirements of a judicial discretion exercised with the view of fairness, feasibility and due regard to the rights of the parties before it.

(c) *In accordance with the accepted standards of judicial discretion, the amendatory Act of June 22, 1938 should not be applied to these proceedings, if the result of so doing would be to destroy and disrupt respondents' remedy.*

Rizer v. *The People*, 18 Col. App. 401; 69 Pac. 315;
Streeter v. *Streeter*, 43 Ill. 155, 156;
Beech Fork Coal Co. v. *Pocahontas Corp.*, 109 W. Va. 39, 47; 152 S. E. 785;
Ex Parte Williams, 128 Tex. Cr. Reports 148; 79 S. W. (2d) 325;
Ford v. *Ford*, 70 Wis. 19; 33 N. W. 188, 196.

The question as to the application of the amendatory Act is therefore one of judicial discretion to be exercised only after a full consideration of the rights of the parties.

On October 26th, 1938, when the order appealed from was entered, the question as to the application of the amendatory Act had never been presented to the District Court by any party in the case and was, in fact, never presented to that court, nor did that court ever make an order regarding that subject at any time (R. 49).

That was the situation on November 25th, 1938 when the petition for leave to appeal was filed (R. 34), on December 13th, 1938, when the Circuit Court of Appeals allowed the appeal (R. 42), on December 22nd, 1938 when the Circuit Court of Appeals approved the appeal bond (R. 42), and on December 23, 1938, when respondents filed their praecipe for record in the District Court (R. 29). As a matter of fact, petitioner itself when it sought to appeal from the order of the District Court of October 28th, 1938 (the order which respondents also appealed from) filed an application for leave to appeal in the Circuit Court of Appeals on December 5th, 1938. This mode of procedure was identical with that taken by respondents (R. 49).

Petitioner was apprised of every step taken by respondents in pursuing their appeal and remained entirely silent in the matter. This silence is peculiarly striking in the light of Rule 38 of the Circuit Court of Appeals for the Seventh Circuit,* governing the allowance of discretionary

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*Rule 38 of the United States Circuit Court of Appeals for the Seventh Circuit.

1. Petitions to this Court for leave to appeal from decisions of the District Court in Bankruptcy cases shall be docketed upon the petitioner's making the required deposit

appeals. Rule 38 provides that the Appellee in such an appeal may, within five days after the application for leave to appeal is filed, file an answer and a brief in opposition to the allowance of the appeal.

The first time that the question of the application of the amendatory Act arose in this record was on January

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for costs and filing an original and three copies of the petition, assignment of errors and brief in support of petition together with proof of service on respondent of copy of each, and with notice of date of filing.

2. *What Petition Shall Contain.* The petition shall set forth the facts under oath which shall contain a brief history of the proceedings in the District Court; all important dates; the amount of the indebtedness; the estimated value of the assets; the amount and status of the claims of the creditors who are petitioning for permission to appeal; a statement showing when such creditors acquired their claims, whether before or after bankruptcy proceedings were instituted; a copy of any order or memorandum of views announced by the District Judge. The respondent may file an answer and if so, it must be under oath, setting forth any pertinent facts which bear upon the exercise of a wise discretion on the part of this Court. It may also contain facts, if supported by the record, bearing on petitioner's right to the relief sought. The petition shall be supported by an original typewritten brief, an original and three copies of which shall be filed with the Clerk which shall set forth the statute and decisions as well as other reasons why the petition should be allowed. Unless permitted by this Court, only those who are parties in the District Court may file briefs in this Court.

3. Respondent may support its answer by a brief of which he shall file an original and three copies within five days from the filing date designated in said notice, together with proof of service of a copy on petitioner. Briefs in support of or in opposition to such application need not be printed.

4. The matter shall then be submitted to the Court by the Clerk. No oral argument by counsel will be heard unless requested by the Court.

10th, 1939, when petitioner sought to dismiss the appeal allowed by the Circuit Court of Appeals on December 13th, 1938 (R. 42).

The nature of petitioner's motion of January 10th, 1939 demands close scrutiny. That motion did not request the Circuit Court of Appeals to apply the amendatory Act from that point *forward* but rather requested the Circuit Court of Appeals to apply the amendatory Act *retroactively* to proceedings which had been taken in connection with the appeal more than a month and a half earlier.

The situation of the parties on January 10th, 1939 is also significant. By that date, the time in which respondents might have proceeded to perfect an appeal from the order of October 26th, 1938 in any other manner had expired. The artifice adopted by petitioner could result, therefore (if it was successful), in the total destruction of respondents' remedy.

The motion of petitioner made on January 10th, 1939, necessarily involves one of two assumptions:

(1) that the amendatory Act had been in application to these proceedings continuously from the date of its enactment even though there had been no judicial determination or consideration of the question, or

(2) that the Circuit Court of Appeals on January 10th, 1939, in determining that the amendatory Act should apply, should make its determination retroactive and *nunc pro tunc*, either as of December 13th, 1938 when it allowed the appeal or as of some earlier date.

The first assumption is disclaimed by petitioner itself. Petitioner admits that a judicial determination is required as to whether the amendatory Act applies or not. (See

Petitioner's Brief page 16). Beyond this, however, the language of the amendatory Act itself, as discussed in earlier portions of this brief (at page 20), not only requires a judicial determination but one made through the application of judicial discretion as well.

The second assumption that the decision of the court to apply the amendatory Act should be as of a date earlier than January 10th, 1939 when the subject was first raised in the record is likewise unsound. Accepted standards of judicial discretion condemn such a practice.

In the recent case of *Ginsberg* v. *Lindel*, 107 F. (2d) 721 (C. C. A. 8 Cir.), a petition in bankruptcy was filed on November 22, 1938, two months after the effective date of the amendatory Act of June 22, 1938. A question arose as to the amount of a landlord's lien. Under the Iowa law and the Bankruptcy Act of 1898, the landlord was entitled to a lien for one year. Under Section 64, sub. a, of the Act of June 22, 1938 (52 Stat. c. 575, pp. 840, 874; 11 U.S.C.A. Sec. 104), the landlord's priority is restricted to rent for the three months prior to the date of the bankruptcy. The trial court held that the landlord's right of priority was to be restricted by the provisions of the amendatory Act. The Circuit Court of Appeals, in reversing the trial court and in holding the amendatory Act not applicable, said (page 725):

> "The Chandler Act is an amendatory act, and the order of the court gave to it a retrospective effect. The effect of the order is to destroy a lien already vested in the lessors to secure the payment of $3,300. That obligation was fixed, and the lien was enforceable under the Iowa law. The trustee's contention that appellants' statutory lien is not a vested property right is erroneous. *Smith* v. *Russel*, 223 Iowa 123, 272 N. W. 121, 125; *Richardson Brothers* v. *Peter-*

son, supra; Grant v. *Whitwell, Marsh & Talbott,* 9 Iowa 152, 157; *Britton* v. *Western Iowa Co.,* 8 Cir., 9 F. 2d 488, 490, 45 A. L. R. 711; 16 C. J. S., Constitutional Law, Sec. 233. The further contention that a right created by statute may be annulled by statute is equally erroneous in so far as the argument implies that vested property rights may be destroyed. Legislation by Congress may supersede that of a state in a particular instance, but Congress can not repeal a state law; nor can it exert control over individual property rights except in the proper exercise of its constitutional powers. The state which enacted the law may repeal it, but the repealing act can not destroy property rights vested under the old law. *Ettor* v. *Tacoma,* 228 U. S. 148, 155, 156, 33 S. Ct. 428, 57 L. Ed. 773; *Hannahs* v. *Felt,* 15 Iowa 141.

"* * * There is nothing contained in the Chandler Act to indicate that Congress intended that section 64, sub. a, should be construed retrospectively; and in the absence of explicit language requiring such construction we are not disposed so to construe it, especially when to do so would result in depriving a citizen of a vested right. It is the general rule that a retrospective operation will not be given to a statute which interferes with antecedent rights, unless such be the unequivocal and inflexible import of its terms and the manifest intention of the legislature. *U. S. Fidelity & Guaranty Co.* v. *United States, to Use of Struthers Wells Co.,* 209 U. S. 306, 314, 28 S. Ct. 537, 52 L. Ed. 804; *Louisville Woolen Mills* v. *Johnson,* 6 Cir., 228 F. 606; *Holt* v. *Henley,* 232 U. S. 637, 34 S. Ct. 459, 58 L. Ed. 767; *Jones* v. *Fidelity & Columbia Trust Company,* 6 Cir., 73 F. 2d 446; *Western Pacific R. Corp.* v. *Baldwin,* 8 Cir., 89 F. 2d 269; *Home Indemnity Company* v. *State of Missouri,* 8 Cir., 78 F. 2d 391."

In connection with the amendment of the Bankruptcy Act in 1926, the Circuit Court of Appeals for the Second Circuit, in the case of *In re John C. Gasteiger & Co.*, 25 F. (2d) 642, said:

"The act of 1926 is an innovation in bankruptcy legislation, the amendments of 1903 (section 18 (11 USCA Sec. 41)) and of 1910 (section 14 (11 USCA Sec. 32)) being both expressly made prospective only. The canon is well settled which interprets statutes prospectively unless the language admits of no other construction (*Chew Heong* v. *U. S.*, 112 U. S. 536, 559, 5 S. Ct. 255, 28 L. Ed. 770; *Shwab* v. *Doyle*, 258 U. S. 529, 42 S. Ct. 391, 66 L. Ed. 747, 26 A. L. R. 1454; *Fullerton Co.* v. *Northern Pacific R. Co.*, 266 U. S. 435, 45 S. Ct. 143, 69 L. Ed. 367), and we are not sure that the clause, 'so far as practicable and applicable,' means to go further than to make the amendments 'applicable' to pending proceedings in matters of procedure, though perhaps it may. Even if it does, it gives the courts a wide discretion in determining when it is 'practicable' so to apply it, and by 'practicable' we understand that we must decide whether it *is just to disturb vested rights.*

"• • • The repugnance of most people to such changes in front does not arise alone from the fact that they may disrupt settlements made on the faith of the earlier assurance. The mere inconstancy of a sovereign in respect of what has once been granted is itself a grievance, and seems an injustice to most men. For these reasons it seems to us that it is not 'practicable' to apply retroactively section 64 (b) (7) to cases where the claims have all been filed and the rights all fixed." (Emphasis supplied.)

The same court in the case of *In Re Inland Dredging Corporation*, 61 F. (2d) 765, certiorari denied in *Castellano* v. *Globe Indemnity Co.*, 288 U. S. 611, said:

> "It has crystallized in the theorem that changes may be made in the remedy, so long as they do not affect the right."

This Court, in promulgating the Rules of Civil Procedure, observed the same concern with respect to actions then pending. (Rule 86 of the Rules of Civil Procedure for the District Courts of the United States):

> "They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."

See:

Harris v. *Biszkowicz* (C. C. A. 8 Cir.) 100 F. (2d) 854.

The General Order of this Court entered on January 16, 1939, promulgating the new General Orders and Rules in Bankruptcy, contained a similar provision:

> "It is further ordered that this order shall take effect on Monday, February 13, 1939, and shall govern all proceedings then pending to which its provisions are applicable, except to the extent that in the opinion of the court its application to such proceedings would not be practicable or would work injustice, in which event the General Orders and Forms in Bankruptcy heretofore established shall apply: * * *." 11 U.S.C.A. 53 (May 1939 Sup. Ed.).

The provisions of the Rules of Civil Procedure and the General Orders in Bankruptcy just quoted are expressions of the judicial doctrine enunciated in *Brinkerhoff-Faris Trust & Savings Company* v. *Walter O. Hill, Treasurer*, 281 U. S. 673, at 682:

> "But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

See also *Graham* v. *Goodcell*, 282 U. S. 409, at page 426:

> "The question is whether these circumstances remove the case from the operation of the general rule that it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed. *Pacific Mail S. S. Co.* v. *Joliffe*, 2 Wall. 450; *Ettor* v. *Tacoma*, 228 U. S. 148; *Forbes Pioneer Boat Line* v. *Everglades Drainage District*, 258 U. S. 338."

See also *Hoyt Metal Co.* v. *Atwood*, (C. C. A. 7 Cir.) 289 Fed. 453 at 455:

> "The statute in question, though purporting to affect only the remedy, in reality impairs the value of a right. Though it may be true that parties to actions have no vested right in rules of procedure, and the latter may be changed at will by the Legislature, without affecting the right, yet if statutes, professing only to affect procedure or remedy, do in fact thereby affect

or impair the right, they are void or inapplicable as against the enforcement of the right thus impaired. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that result is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case, it is prohibited by the Constitution. *Tennessee* v. *Sneed*, 96 U. S. 69; *Bronson* v. *Kinzie et al.*, 1 How. 311; *McGahey* v. *Virginia*, 135 U. S. 695."

A doctrine analogous to the one above discussed is inherent in the rule of construction that a statute should be construed prospectively rather than retroactively.

United States v. *St. Louis, San Francisco & T. R. Co.*, 270 U. S. 1:

"That a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication is a rule of general application. It has been applied by this court to statutes governing procedure, *United States Fidelity & G. Co.* v. *United States*, 209 U. S. 306 * * *."

See also:

Fullerton-Krueger Lumber Company v. *Northern Pac. Ry. Co.*, 266 U. S. 435;
Shwab v. *Doyle*, 258 U. S. 529;
Holt v. *Henley*, 232 U. S. 637.
Sohn v. *Waterson*, 17 Wall. 596;

The Court in *Bird* v. *United States*, 187 U. S. 118 said (Cited with approval in *U. S.* v. *Powers*, 307 U. S. 214):

"There is a presumption against a construction which would render a statute ineffective or inefficient,

or which would cause grave public injury or even inconvenience."

The assumption that the decision of the court to apply the amendatory Act should be *nunc pro tunc* as of a date earlier than January 10th, 1939, when the subject was first raised in the record, is likewise without support.

The prerequisite of a *nunc pro tunc* order is the entry of some earlier memorandum, order or decree by the court which is sought to be amplified or corrected.[7]

Since prior to January 10th, 1939, neither the District Court, nor the Circuit Court of Appeals, had made any memorandum or order with respect to the applicability of the amendatory Act, or, for that matter, had even considered the subject, there is no possible order or decree which might be seized upon as the basis of correction or amendment by a *nunc pro tunc* order. No error, omission or inadvertence of any court or clerk had occurred with respect to the subject and, accordingly, no grounds existed for the entry of a *nunc pro tunc* order.

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[7] *The Bayonne*, 159 U. S. 687;
Charles H. Wight v. *Joseph H. Nicholson*, 134 U. S. 136;
Hickman v. *Ft. Scott*, 141 U. S. 415;
Bank v. *Eldred*, 143 U. S. 293;
Rardin v. *Messick*, (C. C. A. 7 Cir. 1935) 78 F. (2d) 643;
Hammond Hotel & Imp. Co. v. *Chicago T. & T. Co.*, (C. C. A. 7 Cir. 1931) 55 F. (2d) 168;
The Princess Sophia (D. C., W. D., Wash. 1929) 36 Fed. (2d) 591.

III.

The Circuit Court of Appeals properly denied petitioner's motion to dismiss the appeal which it allowed to respondents.

For the purposes of the argument under this section, the correctness of both of petitioner's contentions will be assumed, *i.e.* (1) that this appeal is governed by the Chandler Act; and (2) that an appeal on fees involving more than $500 must be taken as of right rather than by leave of the Circuit Court of Appeals.

Even under these circumstances, the appeal was properly taken, since the motion of respondents for leave to appeal met all of the requirements for a notice of appeal and should be so treated. Section 24(b) of the Chandler Act (11 U.S.C.A. Sec. 47(b)) governs the method of taking an appeal as of right, and provides:

> "Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

General Order 36 (11 U.S.C.A., Sec. 53) in Bankruptcy provides:

> "Appeals shall be regulated, except as otherwise provided in the Act, by the rules governing appeals in civil actions in the courts of the United States, including the Rules of Civil Procedure for the District Courts of the United States." (28 U.S.C.A. following section 723c.)

The Rules of Civil Procedure thus made applicable to an appeal in bankruptcy as of right provide (Rule 73):

> "The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part

thereof appealed from; and shall name the court to which the appeal is taken. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to all the parties to the judgment other than the party or parties taking the appeal, but his failure so to do does not affect the validity of the appeal. * * *"

The procedure actually carried out by respondents met and fulfilled every purpose of the rule. The petition for leave to appeal specified that the respondents, as a Bondholders' Committee, were taking the appeal (R. 34); it designated the judgment appealed from (R. 34); it named the court to which the appeal was taken (R. 34); accompanying the petition for leave to appeal, an assignment of errors was provided (R. 40, 41); and full notification was given to and acknowledged by Petitioner herein (R. 41).

Of course, the petition and notice were not filed with the Clerk of the District Court but with the Clerk of the Circuit Court of Appeals. This distinction is particularly meaningless in this case, however, considering that the District Court itself directed that all of the original papers be assembled by the Clerk of the District Court and be transmitted by him to the Circuit Court of Appeals (R. 33, 34). The result, of course, is that all of the papers in the case, whether in the possession of the District Court Clerk or the Clerk of the Circuit Court of Appeals, shortly came into the possession of the latter, and are now held by him. The steps taken by respondents, therefore, fulfilled the purposes of the Rules of Civil Procedure, which would have governed had the appeal been taken as of right.

A liberal construction of the Rules of Civil Procedure is in accord with their spirit and intent. In the case of *Crump* v. *Hill* (C. C. A. 5 Cir.), 104 F. (2d) 36, Justice

Hutcheson determined that the requirement of a notice of appeal was met in including a waiver of service of notice, and the entry of an appearance, even though the actual notice of appeal was not filed. In the case at bar, the petitioner also entered its appearance (R. 43). Justice Hutcheson said:

> "We agree with appellant. It is true that Rule 73 does specifically provide that the only thing necessary to be done to perfect an appeal is to file notice thereof with the Clerk, making it the duty of the Clerk to see that notice thereof is served, and that a literal compliance with the Rule requires timely filing of the notice with the Clerk. The reason for the Rule, however, to set the appeal in motion by mere notice without judicial action, makes it quite clear we think that the appellant, when he procured from appellee and filed, her waiver of notice, her acceptance of designation, and her entry of appearance, just as effectively started his appeal as if he had merely filed the notice of appeal with, and left its service to, the Clerk. It is true enough that the starting of an appeal within the time fixed is jurisdictional and that good practice requires conformity to the formal requirements of the Rule. But it would we think be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights."

A similar liberal construction was adopted by the Circuit Court of Appeals for the Third Circuit, in *Ainsworth* v. *Gill Glass & Fixture Co.* (C. C. A. 3 Cir.), 104 F. (2d) 83.

In the case of *Martin* v. *Clarke* (C. C. A. 7 Cir.), 105 F. (2d) 685, the Court said:

> "Rule 73(b) of the Supreme Court, 28 U.S.C.A. following Section 723c, provides that 'The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal is taken.' The object of the notice is merely to advise the opposite party that an appeal has been taken from a specific judgment in a particular case; if the notice is plain and explicit in this particular and sufficient in all other respects, it ought not to be declared ineffectual because of some slight mistake in the description of the judgment. Sections 472, 473, 3 Am. Jur. pp. 168 and 169. Courts are liberal in construing the sufficiency of a notice of appeal, and, where it appears from the notice, as in the instant case, that there is sufficient information acquainting appellee as to the judgment appealed from (the appellee not being prejudiced or misled) the mere fact that the designation of plaintiff and defendant was interchanged is no ground for dismissing the appeal. Accordingly, the motion to dismiss is overruled."

In *Siegel* v. *Margiotta* (C. C. A. 2 Cir.), 102 F. (2d) 525, the court held that the notice of a motion for leave to appeal filed in the Circuit Court of Appeals was the equivalent of a notice of appeal which was required to be filed in the District Court, saying:

> "The question is whether the appeal papers were served in season, assuming, as we do, that the notice of motion may be taken as the equivalent of a notice of appeal, since no leave was necessary."

Petitioner's sole reply to these cases is to the effect that "the *Crump* and *Martin* cases involve mere questions of form and not of substance." (See Petitioner's Brief, page 33.) The comment is not apt. Petitioner was not in any way injured by the fact that the notice of appeal was filed in the office of the Clerk of the Circuit Court of Appeals rather than in the office of the Clerk of the District Court. The place of filing the notice is no more or less a matter of form and substance than the filing of what the court considered to be an equivalent of the notice of appeal (as in the *Crump* case) or the filing of a notice of appeal which does not properly describe the judgment (as in the *Martin* case).

The sole comment which petitioner makes with respect to the *Siegel* case is that the Circuit Court of Appeals for the Second Circuit there "assumed without deciding that the motion for leave to appeal filed in the Circuit Court of Appeals might be taken as the equivalent of a notice of appeal."

The view of the court in *Siegel* v. *Margiotta, supra.*, is, however, sustained by ample authority. In *Taylor* v. *Voss*, 271 U. S. 176, this Court was presented with a case in many respects similar to the present one. There, as here, the appeal was instituted through the filing of a motion for leave to appeal in the Circuit Court of Appeals; there, as here, the complaint of the respondent was that the appeal should have been instituted in the District Court rather than in the Circuit Court of Appeals. The subject matter of the appeal involved a controversy between the trustee in bankruptcy and the testamentary trustee of the wife of the bankrupt, presenting an adverse claim which was properly appealable under Section 24a of the Act, which would have required the appeal to be taken as of right from the District Court. There, as here, respondent cited the de-

cision of this Court in *In Re Loving*, 224 U. S. 183, as authority for the proposition that the Circuit Court of Appeals should have dismissed the appeal. (See Footnote, Petitioner's Brief, page 32.)

This Court, in an exhaustive opinion in *Taylor* v. *Voss*, *supra*, held that the Circuit Court of Appeals properly denied the motion of the testamentary trustee to dismiss the appeal and properly heard the case on the petition to revise since only questions of law were presented. (Pertinent portions of the opinion are quoted in the Appendix to this brief.)

The analogy between *Taylor* v. *Voss*, *supra*, and this case is indeed striking. In the case at bar, as in *Taylor* v. *Voss*, the petition for leave to appeal raised only questions of law (R. 40); the Court of Appeals here, as there, in deciding the case, reached its decision on a matter of law —the range of judicial discretion—as distinguished from a fact question (R. 56). The view adopted in *Taylor* v. *Voss* has been expressed in other cases as well.

In Re Rasmussen, 287 Fed. 860 (certiorari denied *Graham; Chisholm & Co.* v. *Firth*, 262 U. S. 753)
Cohen v. *Schultz* (C. C. A. 3 Cir.), 43 F. (2d) 340.

The comment in *Taylor* v. *Voss* to the effect that the construction of the Act there made "gives it a practical effect removing in large measure the technical question of procedure which has so greatly obstructed its efficient administration, and served in so many instances as a trap, not intended by Congress, to unwary persons enmeshed in abstruse perplexities" has particular application to the case at bar. The order appealed from was entered on October 26, 1938, slightly over a month after the effective date of the amendatory Act of June 22, 1938. At that time

the new Rules of Civil Procedure had been promulgated by this Court and had become effective (28 U.S.C.A. following Sec. 723c). These rules superseded the General Equity Rules which had theretofore been in force. However, Rule 81a of the new Rules of Civil Procedure provided that—

> "They do not apply to proceedings in bankruptcy or proceedings in copyright under the Act of March 4, 1909, except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States."

It was not until January 16, 1939, that this Court promulgated the new Rules in Bankruptcy, and there provided, by Rule 36, that appeals in bankruptcy matters should be governed by the new Rules of Civil Procedure.

During the interim period, from September 16, 1938, when the new Rules of Civil Procedure became effective, until January 16, 1939, when this Court promulgated the new General Orders in Bankruptcy, any litigant seeking to take an appeal as of right in the District Court was in a dilemma. Section 24b of the amendatory Act of June 22, 1938 (11 U.S.C.A. Sec. 47b) provided that appellate jurisdiction should be exercised by appeal and in the form and manner of an appeal. The litigant was left with two choices as to how he could commence his appeal: (a) he could proceed under the former equity practice, and file a motion in the District Court for leave to appeal; but the difficulty with this procedure is that the new Rules of Civil Procedure superseded the former equity practice (48 Stat. 1064; 28 U.S.C.A. 723b); or (b) the litigant could proceed by filing a notice of appeal in the District Court as prescribed in the Rules of Civil Procedure; his difficulty then would be that the new Rules of Civil Procedure expressly stated that they were not applicable to bankruptcy proceedings

(Rules of Civil Procedure, Rule 81).[8] This difficulty actually occurred in connection with the notice of appeal served by petitioner in case 6842 on December 5, 1938 (R. 28). Motions to dismiss the appeal thus taken were filed by every appellee to that notice of appeal. Controversies over these motions and over the notices of appeal were, however, disposed of by settlement, except as to the allowance to Glenn Real & Browning, in which case an order affirming the District Court was entered (R. 41).

Wtih this background, the procedure adopted by these respondents becomes quite understandable. By filing a motion for leave to appeal in the Circuit Court of Appeals, they not only followed the express practice approved by this Court in *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172, but they adopted that procedure which was most favorable to petitioners here, since their appeal admittedly raised only questions of law and did not seek to litigate the facts. (See Petitioner's Brief, page 31.) Petitioner has suffered no hardship or inconvenience of any kind as a result of the procedure followed by these respondents in the taking and prosecuting of their appeal. As a matter of fact, it gained important rights in that respondents voluntarily foreclosed themselves from an argument over the facts.

Respondents in taking this appeal found themselves in a most peculiar and difficult position; no judge or court had made an order with respect to the applicability of the amendatory Act of June 22, 1938, to these proceedings (R. 49); grave doubt existed as to whether the new Rules of Civil Procedure or the former equity practice prescribed the proper procedure as to an appeal; the amendatory

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[8] *In Re Schwehm Realty Company*, 100 F. 2d 532 (C. C. A. 3 Cir.).

Act being but recently enacted and the Rules of Civil Procedure being but recently promulgated, no authoritative judicial construction of either the amendatory Act or of the Rules of Civil Procedure had occurred. To say, under these circumstances, as petitioner does, that respondents' appeal should be dismissed, seems indeed not only a harsh and inequitable result, but one contrary to the spirit of the new Rules of Civil Procedure and the General Orders in Bankruptcy.

IV.

The merits of the controversy between the petitioner and respondents have been adjudicated in favor of respondents.

Petitioner admits that the only question raised in the petition for certiorari and the record filed herein relates to the jurisdiction of the court of appeals to allow and entertain the appeal from the order involved in this case. (See Petitioner's Brief, pages 2, 9 and 39.)

It is not disputed, therefore, that the merits of this controversy are not now before this court for review, and that by petitioner's own choosing. Even in the Circuit Court of Appeals, petitioner's position was substantially the same:

> "It (the petitioner) does not seriously dispute the asserted insufficiency of the allowance, but argues that there was not such abuse of discretion as to warrant our disturbing this award." (R. 49.)

Therefore, the ruling of the Circuit Court of Appeals on the merits of this controversy is final and binding upon

all parties.[9] Petitioner's comments to the effect that it "does not admit the justice of the allowance made", (See Petitioner's Brief, page 39), are entirely beside the point. Petitioner has chosen to close these questions in this record.

CONCLUSION

For the reasons assigned, it is respectfully submitted that the decree of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

SAMUEL E. HIRSCH,
JULIAN H. LEVI,
IRWIN J. ASKOW,
Counsel for Respondents.

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[9] *Prudence Company* v. *Fidelity & Deposit Co. of Maryland*, 297 U. S. 198, at 208;
Zellerbach Paper Co. v. *Helvering*, 293 U. S. 172, at 182;
Helvering v. *Taylor*, 293 U. S. 507, at 511;
Clark v. *Williard*, 294 U. S. 211, at 216;
Washington, Virginia & Maryland Coach Co. v. *National Labor Relations Board*, 301 U. S. 142;
Erie Railroad Co. v. *Collins*, 253 U. S. 77;
Great Northern Railway Co. v. *U. S.*, 208 U. S. 452.

APPENDIX

Taylor v. *Voss*, 271 U. S. 176 at page 184.

"This precise question, in the broad form in which it is now presented, has not been specifically decided by this Court. It is true that *In Re Loving, supra,* 188 (56 L. ed. 726, 32 Sup. Ct. Rep. 446), there was general language, incidentally used, which if taken broadly, indicates that 'controversies' which are appealable under Sec. 24a cannot be reviewed by petitions for revision under Sec. 24b. But, according to a familiar rule, this language should be regarded as limited by the circumstances in which it was used. *Cohen* v. *Virginia,* 6 Wheat. 264, 399, 5 L. ed. 257, 290; *Bailey* v. *Baker Ice Mach. Co.,* 239 U. S. 272, 60 L. ed. 285, 36 Sup. Ct. Rep. 50. The case did not present a 'controversy' appealable under Sec. 24a, but, as was explicitly stated, a 'proceeding' in bankruptcy relating to a proof of claim filed by a creditor, with the incidental assertion of a statutory lien, as to which a special appeal was granted by Sec. 25a, to be taken within ten days. The trustee contested both the amount of the claim and the existence of the lien. The bankruptcy court allowed the claim for its full amount as a lien against the bankrupt estate. Thereupon, more than ten days thereafter, the trustee filed a petition for a revision of this order, abandoning his contest as to the amount of the claim, and insisting merely that there was error in matter of law in allowing the lien as security. On a certificate from the circuit court of appeals, presenting the single question whether, under these circumstances, the order of the bankruptcy

court could be reviewed upon a petition for revision, it was held that Sec. 24b 'was not intended to give an additional remedy to those whose rights could be protected by an appeal under Sec. 25 of the Act.' And, since no question as to the effect of Sec. 24a was presented by the certificate or involved in the decision, it is clear that its effect must be limited, as a controlling authority, to the holding that when the ten days had expired within which the special appeal might have been taken under Sec. 25a, bringing up both the facts and the law, the trustee could not thereafter, by abandoning his contention of fact, obtain by a petition for revision a review of the question of law which he might have obtained by an appeal taken within the prescribed time, and thereby extend, as to the question of law, the time within which he was entitled to obtain a review of the order.

"On the other hand, in *Hewit* v. *Berlin Mach. Works*, *supra*, 299 (48 L. ed. 987, 24 Sup. Ct. Rep. 690), presenting a 'controversy' in a bankruptcy proceeding in which the facts were not disputed that had been reviewed by an appeal under Sec. 24a, it was distinctly recognized that a review might also have been had in matter of law by a petition for revision under Sec. 24b. And it is well settled by other decisions of this court that a 'controversy' in bankruptcy proceedings may be reviewed by a petition for revision as to some matters of law, at least. Thus, where a trustee has instituted a summary proceeding in a bankruptcy court for the recovery of property in the possession of a third person asserting a claim adverse to the bankrupt estate, a petition for revision will lie to bring up for review the question of law whether the court of bankruptcy has jurisdiction to adjudicate the

merits of such controversy in a summary proceeding. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 25, 46 L. ed. 413, 416, 22 Sup. Ct. Rep. 293; *Schweer* v. *Brown*, 195 U. S. 171, 172, 49 L. ed. 144, 145, 25 Sup. Ct. Rep. 15; *Galbraith* v. *Vallely*, 256 U. S. 46, 48, 65 L. ed. 823, 824, 41 Sup. Ct. Rep. 415; *Taubel-Scott Kitzmiller Co.* v. *Fox*, 264 U. S. 426, 429, 68 L. ed. 770, 772, 44 Sup. Ct. Rep. 396. An analogous rule was also applied in *Weidhorn* v. *Levy*, 253 U. S. 268, 270, 64 L. ed. 898, 899, 40 Sup. Ct. Rep. 534. There the trustee had filed in the bankruptcy suit a bill in equity against an adverse claimant, thereby instituting a 'controversy' in the bankruptcy proceeding. The referee, over an objection to his jurisdiction had entertained the bill and entered a final decree in favor of the trustee. The district judge, considering the jurisdictional question alone, dismissed the bill upon the ground that the referee had exceeded his powers. This question was taken to the circuit court of appeals by a petition for revision, and while this court said that if the district court had sustained the jurisdiction and passed upon the merits, the decree could only have been reviewed by an appeal—evidently referring to a review both of fact and law—it was held that 'since the decision turned upon a mere question of law as to whether the referee had authority to hear and determine the controversy—in effect a question of procedure—it properly was reviewable by petition to revise under Sec. 24b.' And, subsequently, it was tacitly assumed by this court, in two decisions, without question, that where trustees had instituted summary proceedings in the bankruptcy courts involving controversies with third persons asserting adverse claims to the property of the bankrupts, the circuit courts of appeals had jurisdiction under petitions for revision

to determine all the questions of law presented on the undisputed facts, both as to the summary jurisdiction of the bankruptcy courts and the merits of the controversies; and this court based its judgments upon a review of the questions of law thus presented, both as to the existence of summary jurisdiction and the merits. *Board of Trade* v. *Johnson*, 264 U. S. 1, 6, 68 L. ed. 533, 534, 44 Sup. Ct. Rep. 232; *May* v. *Henderson*, 268 U. S. 111, 112, 69 L. ed. 870, 872, 45 Sup. Ct. Rep. 456.

"In the light of these decisions,—bearing in mind that the only distinction in matter of substance between an appeal and a petition for revision is that the one brings up for review questions both of fact and law, and the other, those of law merely, and finding nothing in the letter of the Act which necessarily makes the comprehensive remedy of an appeal as to both fact and law, exclusive of the narrower remedy of a petition for revision in matter of law,—we conclude that in a 'controversy' arising in a bankruptcy proceeding, it is not essential to a review, when the facts are undisputed or no longer questioned, that resort should be had to an appeal under Sec. 24a; but that in such case the controlling questions of law may also be reviewed by a petition for revision under Sec. 24b, whether they relate merely to the jurisdiction of the bankruptcy court or to the merits of the controversy. Such a review, however, by petition for revision, is a concurrent remedy merely, and in conformity with the decision in the *Loving* case, cannot, irrespective of any other limitation, be deemed an 'additional remedy' which may be resorted to after the time for an appeal has expired. This construction of the Act is, we think, consistent with its letter; accords with its spirit and manifest purpose; and gives

it a practical effect removing in large measure the technical question of procedure which has so greatly obstructed its efficient administration, and served in so many instances as a trap, not intended by Congress, to unwary persons enmeshed in abstruse perplexities.

"It results that, as the controversy in the present case was presented in the bankruptcy proceeding by consent of the parties, for determination as a matter of law on stipulated facts, it was properly reviewable by the circuit court of appeals in such matter of law under the petition for revision."

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1939.

No. 386

THE DICKINSON INDUSTRIAL SITE, INC., A CORPORATION, FORMERLY THE ALBERT DICKINSON COMPANY,

Petitioner,

vs.

PERCY COWAN, EDGAR N. GREENEBAUM, WALTER A. WADE AND JULIAN H. LEVI, AS A BONDHOLDERS' COMMITTEE ACTING UNDER DEPOSIT AGREEMENT DATED AUGUST 1, 1934,

Respondents.

PETITION FOR REHEARING.

WALTER A. WADE,
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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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Respondents.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now comes the petitioner, The Dickinson Industrial Site, Inc., a corporation, and presents this, its petition for a rehearing of the above entitled case, and in support thereof respectfully shows:

This Court granted certiorari to resolve a conflict between the decision of the Circuit Court of Appeals for the Second Circuit in *London* v. *O'Dougherty*, 102 F. (2d) 524, and the decision in this case by the Circuit Court of Appeals for the Seventh Circuit. In the *London* case it was held that appeals from compensation orders involving $500 or more may be taken as of right under the

Chandler Act. In this case it was held that appeals from these orders may be taken only upon allowance by the appellate courts, and this Court has affirmed, basing its decision upon the following conclusions:

1. Section 250 provides that the manner of appeal from compensation orders shall be by allowance of the circuit court of appeals.

   a. The addition of the words "and allowed by" in Section 250 would otherwise be meaningless.

   b. Section 24 can be held to govern the manner of appeal from compensation orders only if the word "taken to and allowed by" in Section 250 are construed "taken to *or* allowed by" the circuit court of appeals.

   c. The words "taken to" as used in Section 250 were construed in *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172, to mean "allowed by".

2. Apart from Section 24, the circuit courts of appeals are invested by Section 250 with appellate jurisdiction to allow appeals from compensation orders. Because of the controversies regarding a revision of Section 24, Section 250 was intentionally isolated from Section 24.

3. Section 24 retains the distinction existing under former Section 24 as to appeals of right and appeals by leave of the appellate courts.

4. Sound policy would seem to require fiduciaries to make out a *prima facie* case of inequitable treatment in order to be heard before the circuit court of appeals.

Petitioner respectfully submits that the foregoing conclusions are unsound and that, upon a reconsideration of the case, the Court will adopt the construction of the Chandler Act by the Circuit Court of Appeals for the Second Circuit in the *London* case.

Before proceeding with the argument, in the course of which these conclusions will be examined, petitioner desires to point out:

First. The principle is well settled that when the language of a statute is unambiguous resort to extraneous aid in its interpretation is not permissible (*Kuehner* v. *Irving Trust Co.*, 299 U. S. 445, 449; *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 278).

Relying upon this principle, petitioner made no examination of the Congressional Records. No argument based upon the Congressional Records was presented to this Court by either petitioner or respondents. This Court apparently decided that the language of Section 250 was ambiguous and made its own examination of the Congressional Records, unassisted by counsel in this case.

Second. Clearly, the words "taken to and allowed by" in Section 250 cannot mean "taken to *or* allowed by". Respondents' argument against the construction urged by petitioner contained no such suggestion. It never occurred to counsel in this case that these words in Section 250 were susceptible of this construction. This issue was injected into the case for the first time by this Court at the close of the oral argument for petitioner. At that time counsel for petitioner denied that Section 250 must be construed "taken to *or* allowed by" in order to hold that the manner of appeal from compensation orders is governed by Section 24. It is apparent that the Court did not have the benefit of having this issue fully argued by counsel in the case.

I.

SECTION 250 BY ITS TERMS INCORPORATES SECTION 24 AS TO THE MANNER OF APPEAL.

Section 24 provides that review in all cases shall be by appeal, to be taken as of right when $500 or more is involved and "only upon allowance of appellate court" when less than $500 is involved. By this section, the

manner of appeal is made to depend upon the amount involved.

Section 25 provides for the time within which "appeals" may be taken.

Section 250 declares that "appeals may be taken * * * and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals". The other provisions of Section 250 regulate the procedure in the circuit court of appeals *after* the appeal has been perfected.

Since the form of review is in all cases by appeal, the "manner of appeal" in Section 250 can refer only to the method by which the appeal is to be taken. The method of taking the appeals is provided for by Section 24.

The expression "appeals * * * may * * * be taken to and allowed by the circuit court of appeals" is merely stating elliptically that "appeals may be taken to the circuit court of appeals and may be allowed by the circuit court of appeals".

The plain sense of the language of Section 250 is that "appeals may be taken to the circuit court of appeals *and* may be allowed by the circuit court of appeals in the manner provided for appeals by Section 24 of this Act, to-wit: When $500 or more is involved the appeal shall be taken as of right *and* when less than $500 is involved the appeal shall be taken only upon allowance of the appellate court". Then, as though to emphasize the right to an appeal, the words "may be taken" are repeated.

Such is the natural, logical, and grammatical construction of these sections of the Chandler Act.

a. *The construction contended for by petitioner does not render meaningless the words "and allowed by" in Section 250.*

1. If these words had been omitted, then the argument might be made (paralleling respondents' argument in this Court) that Section 250 authorizes appeals from all compensation orders to be taken as of right.

2. The clause "in the manner * * * provided for appeals by this Act" modifies "taken to and allowed by the circuit court of appeals". Appeals are not to be taken as of right to the circuit court of appeals "in the manner * * * provided for appeals by this Act". Appeals are not to be taken upon allowance by the circuit court of appeals "in the manner * * * provided for appeals by this Act". But they are to be "taken to and allowed by the circuit court of appeals" in the manner provided for appeals by the Act.

3. The history of Section 24 and Section 250 in the House clearly shows that it was the intent of Section 250 to incorporate Section 24 as to the manner of appeal, and, in fact, Section 250 so declared. The history of these sections, and related Sections 102 and 121, are contained in an Appendix. However, it should be stated here: Under Section 24 of H. R. 6439 (reintroduced as H. R. 8046) appeals from compensation orders were required to be allowed by the appellate courts, but it was further provided that "where, within the time limited for taking appeals, an appeal has been taken as of right instead of by allowance of the appellate court, the appellate court may in its discretion allow such appeal at any time before final determination with the same effect as if it had been duly allowed when taken". To cover this contingency, it was provided by Section 12 II d (7) (Section 250 as passed by the House) that appeals might be "taken to and alllowed by the circuit court of appeals"—"in the manner and within the time provided for appeals by this Act". In this connection, it should be noted that the words in Section 250 "taken to and allowed

by" the appellate court are not synonymous with the words "taken by allowance of the appellate court" used in Section 24. This conclusion is reinforced by the construction of the language of Sections 24, 102, 121, and 250 (derived from Sections 24, 77B(k), 77B(o), and 77B(c) (9) respectively) by this Court.[1]

b. When the words "taken to and allowed by" in Section 250 are given their natural, logical, and grammatical meaning, it must be held that Section 24 governs the manner of appeal from compensation orders. These words cannot be construed (1) to mean "taken to or allowed by", or (2) to mean "taken upon allowance by".

The Court states that to hold that the manner of appeal from compensation orders is governed by Section 24, it is necessary to construe the words "taken to and allowed by" to mean "taken to *or* allowed by". Obviously, these words cannot be so construed, and there is no necessity for such construction.

The Court further states that to hold that the manner of appeal from compensation orders is governed by Section 24 is to render meaningless the words "and allowed by" in Section 250. As hereinbefore pointed out, this is not true. In its present opinion, the Court construes these words not as "taken to and allowed by" but as "taken upon allowance by". This construction renders inoperative and meaningless the words "in the manner • • • provided for appeals by this Act" in the same section.

1. This Court held that Section 77B(k) made Sections 24 and 25 applicable to proceedings under Section 77B and that appeals from compensation orders were authorized to be taken only in the manner provided for appeals by those sections. See *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172; *O'Connor* v. *Mills*, 300 U. S. 26; *Meyer* v. *Kenmore Hotel Co.*, 297 U. S. 160. The decisions of the lower federal courts were to the same effect: *Dee* v. *United Exchange Building*, 88 F. (2d) 372; *In Re Wilson-Sheridan Hotel Co.*, 86 F. (2d) 98; *In Re New York Investors*, 79 F. (2d) 179; *In Re Grocery Center*, 91 F. (2d) 76. These cases were cited in the Brief for Petitioner, at pages 15 and 25.

1. The words "taken to and allowed by" in Section 250 cannot be construed to mean "taken to or allowed by".

(a) Such construction is not logical.

(1) Section 250 declares that appeals may be taken to "the circuit court of appeals". The quoted words designate the court to which the appeal may be taken. The inappropriateness of the use of "or" here is obvious.

(2) An appeal cannot be taken to the circuit court of appeals until the appeal has been allowed or otherwise taken in the bankruptcy court. Otherwise, there is no "appeal" which can be "taken to" the circuit court of appeals and "allowed by" it. If the intent was to make appeals from compensation orders only by leave of the circuit court of appeals, this intent would have been expressed by the words "taken by allowance of" the circuit court of appeals, (Section 24 of the House Bill H. R. 6439 (H. R. 8046)), or "taken only upon allowance by" the circuit court of appeals (present Section 24). The history of Section 24 in the House Committee clearly shows that the committee was thoroughly familiar with the distinction between appeals "taken as of right" and appeals "taken by allowance of the appellate court". (See Opinion, Footnote 3; and H. R. hearings on H. R. 6439 (H. R. 8046) 75th Con. 1st Sess. pp. 78-80, 214-218, 223-224, 240-241, 405-406.)

(b) Such construction is not grammatical.

The use of the word "or" implies an alternative. To be taken "in the manner" provided for appeals by Section 24, appeals must be taken as of right when the amount involved is $500, or over, *and* upon allowance by the appellate court when the amount involved is less than $500. No alternative is given the person proposing to appeal.

2. The words "taken to and allowed by" cannot be construed "taken upon allowance by" the circuit court of appeals.

(a) *The words "taken to and allowed by" are not synonymous with "taken by allowance of", and were not so used in Section 250.*

Compare Section 24. This subject has previously been covered.

(b) *Such construction renders the words "in the manner * * * provided for appeals by this Act" inoperative and meaningless.*

If the words "taken to and allowed by" in Section 250 are construed to mean "taken upon allowance by" then it is clear that the words "in the manner * * * provided for appeals by this Act" in that Section are rendered inoperative and meaningless. If the words "taken to and allowed by" in Section 250 describe the manner of appeal from compensation orders, then it was needless to provide that "the manner" of appeal should be "in the manner * * * provided for appeals by this Act". This would be mere repetition. Such could not have been the intention. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word in the statute.

In *Early* v. *Doe*, 16 How. 610, this Court said at page 617:

> "Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning."

An again in *Market Co.* v. *Hoffman*, 101 U. S. 112, this Court said at page 115:

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word."

Petitioner's argument on this point appears in the Brief for Petitioner at pages 22-25.

c. *The Court failed to consider and give effect to the words "may be taken * * *, and" in Section 250.*

The House revision of Section 24 retained the distinction between "controversies arising in bankruptcy proceedings" and "proceedings" in bankruptcy (Opinion, footnote 3). Section 250 expanded Section 77B (c) (9) to enlarge the scope of review upon appeal from compensation orders to cover a review of the facts as well as the law, and to provide for a hearing upon the original papers (Opinion, footnote 3).

When the House Bill reached the Senate, Section 24 was completely revised. The present Section 24 was substituted for the revision of that Section by the House. By Section 24 the amount involved was established as the test for determining the manner of appeal. Section 250, as passed by the House, was also revised by inserting the words which appear in bold face:

> "Appeals **may be taken** in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, **and** may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

An explanation of the insertion of these words may possibly be found in the suggestion made by Professor John Gerdes before the Senate Committee[2]:

> "The purpose of these two suggestions is to make it clear that we are actually increasing the jurisdiction of the appellate court. At the present time the appellate court cannot review, as to questions of fact, orders of the type covered by this Section. This language makes it clear that additional jurisdiction is being conferred."

This suggestion is significant. It shows clearly the rela-

2. S. Hearings on H. R. 8046, 75th Cong., 2nd Sess., p. 81.

tionship between Section 24 and Section 250. It shows that to authorize the circuit courts of appeals to review compensation orders *on the facts*, a jurisdiction not conferred upon them by Section 24, it would be necessary in Section 250 to add to the jurisdiction conferred by Section 24. More important still it shows:

1. Section 24 was intended to confer complete appellate jurisdiction on the circuit courts of appeals when the Bill, H. R. 8046, passed the House.

2. Section 250 did not confer jurisdiction on the circuit courts of appeals to review compensation orders on the facts, and if review on the facts was desired, it would be necessary in Section 250 to add to the jurisdiction conferred upon the circuit courts of appeals by Section 24.

3. The failure of Section 24 to confer this jurisdiction escaped notice in the House.

4. The words "may be taken" would cure this defect, the words "and allowed by" having no bearing on the question of jurisdiction.

(5) It was not the intent of a Bill, H. R. 8046, as it passed the House, to set Section 250 apart from Section 24.

It does not appear anywhere in the Congressional Records when this change in Section 250 was made. As revised, Section 24 conferred appellate jurisdiction "both in matters of law and in matters of fact" upon the circuit courts of appeals. If these words were inserted in Section 250 before the revision of Section 24, their only purpose was to add to the jurisdiction conferred upon the circuit courts of appeals by Section 24 authority to review compensation orders on the facts. Upon the revision of Section 24, these words were no longer necessary for the purpose for which they were employed, and probably were retained because not inconsistent with Section 24. If the

words were inserted in Section 250 after the revision of Section 24, their only purpose would be to emphasize the right to an appeal in all cases where the amount involved was $500 or over. In any event, the words have no bearing upon the construction of the other words in the section.

The Congressional Records affording no aid in the interpretation of the words "may be taken", Section 250 must be construed with these words in it (*Early* v. *Doe*, 16 How. 610; *Market Co.* v. *Hoffman*, 101 U. S. 112). Therefore, quite independently of a consideration of the words "and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals", Section 250 permits appeals to be taken in the manner provided for by appeals by Section 24.

d. *The words "taken to" in Section 77B (c) (9), from which Section 250 is derived, were not construed in Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172, *to mean "allowed by".*

Section 77B (c) (9) provided that appeals from compensation orders "may be taken to the Circuit Court of Appeals". Section 77B (k), after making certain exceptions not material here, provided that:

> "All other provisions of this Act, except such as are inconsistent with this Section 77B, shall apply to proceedings instituted under this Section, whether or not an order to liquidate the estate has been entered."

In the *Shulman* case the words "taken to" were not construed to mean "allowed by." What this Court decided in that case was that by virtue of Section 77B (k), Sections 24 and 25 were made applicable to proceedings under 77B, and appeals from compensation orders were, therefore, authorized to be taken only as provision therefore had been made by Section 24.[3]

3. Brief for Petitioner, p. 15 and p. 25. Cases cited footnote 1, *supra*.

Section 102, derived from Section 77B (k), provides in part as follows:

> "SEC. 102. The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That section 23, subdivision h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive."

Section 121, derived from Section 77B (o), is as follows:

> "Where not inconsistent with the provisions of this chapter, jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding."

In the *Shulman* case this Court held it was not inconsistent with Section 77B (c) (9) to require appeals to be taken in the manner provided by Section 24. These Sections of Chapter X, being substantially a re-enactment of the provisions of Section 77B, should receive the same construction.

II.

SECTION 250 DOES NOT CONFER UPON THE CIRCUIT COURTS OF APPEALS JURISDICTION TO ALLOW APPEALS.

The Court holds in its present opinion that Section 250 *restricts* appeals. Admittedly Section 24 does not authorize the circuit courts of appeals to allow appeals from orders where the amount involved in the order is $500 or more. If Section 250 is to stand alone, as the Court apparently holds, it is not enough to say that Section 250 restricts appeals: it must be held that Section 250 confers complete jurisdiction upon the circuit courts of appeals to allow appeals. As appears from what has been hereinbefore stated, the words "and allowed by" were not in-

tended to confer appellate jurisdiction upon the circuit courts of appeals. It was not until the House Bill reached the Senate that the necessity of conferring jurisdiction upon the circuit court of appeals to review compensation orders upon the facts was observed. If Professor Gerdes' suggestion was adopted, it was the insertion of the words "may be taken" which was intended to confer additional jurisdiction and not the words "and allowed by". The Senate revision of Section 24 removed all doubt as to the appellate jurisdiction of the circuit courts of appeal to review compensation orders upon the facts as well as the law, as required by Section 250 as passed by the House.[3] This subject has already been covered in the preceding point. The present construction overturns the prior construction by this Court of the same language now embodied in Sections 102 and 250.[4]

III.

SECTION 24 ABOLISHES THE DISTINCTION EXISTING UNDER FORMER SECTION 24 AS TO APPEALS AS OF RIGHT AND APPEALS BY LEAVE OF THE APPELLATE COURTS.

In its opinion, the Court states at page 5:

> "But it is perhaps significant that that report in commenting on § 24 stated not that it 'abolished' but that it 'practically abolished' the distinction between appeals as of right and appeals by leave of appellate courts."

Section 24 abolishes the distinction between "controversies arising in bankruptcy proceedings" and "proceedings" in bankruptcy. Neither the petitioner nor the respondents contended that Section 24 "abolished" the distinction between appeals as of right and appeals by leave

3. See article by Professor John Gerdes, CORPORATE REORGANIZATION: CHANGES EFFECTED BY CHAPTER X OF THE BANKRUPTCY ACT, 52 Harvard Law Review 1, 37-38 (November 1938).

4. See cases cited in footnote 1.

of the appellate courts. Clearly, this distinction is made by Section 24. The comment in the Senate Committee Report that the distinction between appeals as of right and appeals by leave of the appellate court is "practically abolished" is unquestionably correct. Review of an order which involves less than $500 is rarely sought. If the comment on Section 24 had stated, not that it "abolished", but that it "practically abolished", the distinction, with respect to appeals, between orders in "controversies arising in bankruptcy proceedings" and orders in "proceedings" in bankruptcy, then, in view of the fact that compensation orders are "proceedings" in bankruptcy and were reviewable under former Section 24(b) only in the discretion of the appellate court, there might exist some basis for the argument that this distinction was retained by Section 24 in relation to Section 25. The succeeding sentence in the comment makes it perfectly clear that this result was not intended. That sentence is: "Under it, appeals may be made as of right *in all cases* involving $500 or more". (Opinion, footnote 4.)[5]

If Section 250 is complete in itself, then there is no necessity for this Court to refer to Section 24 in construing Section 250. If there is hidden in Section 24 the old distinction, in respect of appeals, between "controversies

5. Section 23b preserves the distinction between plenary proceedings and summary proceedings in the bankruptcy courts. Order 37 of the General Orders in Bankruptcy regulates the practice in plenary proceedings. The right to an interlocutory appeal in plenary proceedings is governed by general law applicable to the nature of the proceedings. See article by Professor John Gerdes, CORPORATE REORGANIZATIONS: CHANGES EFFECTED BY CHAPTER X OF THE BANKRUPTCY ACT, 52 Harvard Law Review 1 (November, 1938) p. 37, where the author states:

> "Except as to appeals from interlocutory orders, decrees or judgments, it is no longer necessary to make the often confusing distinction between 'controversies' in the proceedings and 'proceedings'. Interlocutory as well as final orders arising in any type of 'proceeding' are appealable, but apparently appeals in 'controversies' may be taken only from final orders. The facts may now be reviewed on appeals from all types of 'proceedings', as well as from 'controversies', with the exception that only matters of law may be reviewed when the appeal is from a judgment on a verdict rendered by a jury."

arising in bankruptcy proceedings" and "proceedings" in bankruptcy, then, instead of simplifying appeals, Section 24 adds to the confusion heretofore existing under that Section. Prior to the present opinion of this Court it seemed perfectly clear that appeals from compensation orders under the liquidation sections and the relief chapters (Chapters X-XIII) of the Act could be taken as a matter of right when more than $500 was involved.

Does the old distinction exist with respect to appeals from all compensation orders? And to appeals from what other orders will the old distinction apply?

IV.

THE POLICY OF CONGRESS, AS EXPRESSED IN SECTION 250, IS TO TIGHTEN CONTROL OVER FEE ALLOWANCES BY ENCOURAGING RATHER THAN DISCOURAGING APPELLATE REVIEW OF COMPENSATION ORDERS.

The Court states at page 6 of its opinion that:

> "it seems sound policy to require fiduciaries to make out a prima facie case of an equitable treatment in order to be heard before the appellate court."

Here the Court apparently overlooks the effect of its present decision. The Debtor is as much concerned with compensation allowances as are the fee claimants. It seems safe to assume that the sordid chapters in the history of fees in corporate reorganizations, to which the Court refers in its present opinion, involve cases where the fees allowed have been too large rather than too small. The present decision restricts the Debtor's right to appeal from compensation orders as well as the fee claimants'. This restriction on the right of appeal quite obviously makes for less, rather than more, effective control over fees. Under the Bankruptcy Act, the circuit courts of appeals are charged with the duty of control-

ling fee allowances and of correcting the abuses to which fee allowances are peculiarly subject. This control is exercised through appellate review. In furtherance of the policy of placing fees under more effective control, Congress, by the Chandler Act amendments, removed two obstacles which had theretofore hindered review of fee allowances. These were:

First. The limitation on the scope of review to matter of law only. Normally, this limitation restricted review to a single legal issue—abuse of discretion. Because of the difficulty of showing, as a matter of law, the existence of such abuse, appeals were ineffectual as a means of correcting fee allowances.

Second. Expense involved in the appeal. Appeals from compensation orders were heard in the same manner as appeals in other cases, upon a printed record and printed briefs.

Congress intended by Section 250 to facilitate appeals by permitting the circuit courts of appeals to dispose of appeals from compensation orders expeditiously and inexpensively by granting a summary hearing upon the original papers. In disposing of these appeals the circuit courts of appeals are required to exercise their own judgment based upon a review of the facts as well as the law. The policy of Congress, as expressed in Section 250, is to tighten control over fee allowances by encouraging rather than discouraging appellate review of compensation orders.

At pages 4-5 of its opinion the Court states:

> "There was not the slightest intimation of any dissatisfaction with the rule of *Shulman* v. *Wilson-Sheridan Hotel Co.*, *supra*, or with Sec. 250 as it was passed by the House."

The effect of the decision in the *Shulman* case was to limit the scope of review on appeals from compensation orders to matter of law only. Section 250, as it passed the

House (See also H. R. 6439), clearly indicates a dissatisfaction with this rule. Although compensation orders were not included by Section 24 in the type of orders which the circuit court of appeals was permitted to review upon the facts, the House intended by Section 250 to enlarge the scope of review on appeals from compensation orders to include a hearing upon either the facts or the law.

V.

THE OBJECT SOUGHT TO BE ACCOMPLISHED BY THE REVISION OF THE APPEAL PROVISIONS WAS TO SIMPLIFY AND MAKE UNIFORM APPEALS TO THE CIRCUIT COURTS OF APPEALS FROM ORDERS OF THE BANKRUPTCY COURTS.

It clearly appears from an examination of the Congressional Records that the purpose of the revision of Sections 24 and 25 was to simplify the appellate procedure and to do away with the confusion and injustice resulting from the distinction between appeals as of right and appeals by allowance of the appellate court based upon the unsatisfactory differentiation between "controversies arising in bankruptcy proceedings" and "proceedings" in bankruptcy. Nothing contained in Section 250 indicates an intention by Congress not to extend this policy to appeals from compesation orders under Section 250. The general policy expressed in Section 102 making, except where inconsistent with the provisions of Chapter X, the provisions of Chapters I to VII of the Act applicable to proceedings under Chapter X, and the fact that Section 250 is not only not inconsistent with the provisions of the revised Section 24 but actually follows the pattern of that Section with respect to "the manner" of appeal, indicate a clear congressional intent to conform Section 250 to the revised Section 24. There is

also the desirable objective of uniformity in procedure for the entire Act, and such uniformity should not be violated or sacrificed except where the context clearly compels a variance, or Congress has otherwise specifically provided.[6]

The record of the hearings on H. R. 6439 (H. R. 8046) plainly shows all persons concerned with the revision of the Bankruptcy Act believed that a revision of Sections 24 and 25 would govern the practice and procedure upon appeals from orders of the bankruptcy courts.

The House revision of Sections 24 and 25 was not satisfactory to the Bar, and at the May meeting of the American Bar Association, the Report of the Standing Committee on Commercial Law and Bankruptcy, disproving the House revision and recommending the adoption of the amendments presented by Mr. Ruben G. Hunt and by Mr. W. B. Henderson, was approved.[7] At the 1938 meeting of the American Bar Association, the Association reiterated its stand.[8]

In substance the only difference between the Henderson proposal and the Hunt proposal was that the Henderson proposal restricted the scope of review on appeals from certain types of orders to matters of law only, while the Hunt proposal authorized review in both matters of fact and matters of law.[9] Both proposals recommended (1) that the distinction between "controversies arising in bankruptcy proceedings" and "proceedings" in bankruptcy be abolished; (2) that appellate jurisdiction be restricted to appeals involving $500 or over; (3) that all appeals be permitted to be taken as of right; and (4) that

6. Brief for Petitioner, pp. 26-30.

7. Vol. 62, Reports of American Bar Association (1937) pp. 623-624, 631-632; H. R. Hearings on H. R. 6439 (H. R. 8046), 75th Cong. 1st Sess. pp. 80, 213-4, 222-3. Mr. Hunt's suggested revision of Sections 24 and 25 was approved by the Los Angeles Credit Men's Association and the Los Angeles Wholesalers' Board of Trade. H. R. Hearings on H. R. 6439 (H. R. 8046), 75th Cong. 1st Sess. pp. 405-406.

8. Vol. 63 Reports of American Bar Association (1938) pp. 234-235.

9. H. R. Hearings on H. R. 6439 (H. R. 8046), 75th Cong. 1st Sess. pp. 217-8; cf: 223.

the new Rules of Civil Procedure relating to appeals be incorporated. Mr. Hunt stated that his proposals would accomplish, among others objects:[10]

> "1. Abolish the vexatious distinction between 'controversies arising in bankruptcy proceedings' and 'proceedings in bankruptcy proper.'
>
> 2. Abolish the troublesome situation where the appellate court must determine whether it has the power to consider questions of law only or can consider both questions of law and of fact.
>
> 3. Abolish the nuisance situation that now exists where a petition for appeal must be allowed by a special order of the lower court or the appellate court.
>
> 4. Abolish the present system in the form of certiorari proceedings where the appellate court has discretion to allow or refuse an appeal in certain classes of cases."

Mr. Henderson claimed that his proposal would accomplish the same object.[11]

Mr. Hunt argued that the 1926 amendments, which required permission of the appellate court for leave to appeal, had doubled the work of these courts by requiring them to pass twice upon the same points of law involved, and that the expense involved in appealing upon trivial and unimportant matters would be a sufficient deterrent to appeals of this kind.[12] When the scope of review was broadened to include a review of the facts and the law, the burden of requiring the appellate courts to pass twice upon the same matters is apparent.

The recommendation by the American Bar Association of the proposal of Mr. Hunt was adopted by the Senate, except that appeals involving less than $500.00 were authorized to be taken upon allowance by the appellate courts.

After the passage of the Chandler Act amendments, Mr. Jacob I. Weinstein and Professor John Gerdes, both

10. H. R. Hearings on H. R. 6439 (H. R. 8046), 75 Cong., 1st Sess. p. 218.

11. H. R. Hearings on H. R. 6439 (H. R. 8046), 75th Cong., 1st Sess. p. 223.

12. H. R. Hearings on H. R. 6439 (H. R. 8046) 75th Cong. 1st Sess. 217.

of whom testified before the House and Senate Committees, agree that appeals in all cases from orders in proceedings under the Act are authorized to be taken as of right where the amount involved is $500 or over.[13]

13. Jacob I. Weinstein, THE BANKRUPTCY LAW OF 1938, where the author states at page 65-66:

"These baffling and confusing distinctions, which gave rise to many injustices and endless confusion, have been eliminated by the Chandler Act. All appeals to the circuit courts may now be taken as of right, except that an appeal from an order, decree or judgment involving less than $500 must still be allowed by the Circuit court, and all appeals now review both the law and the facts, except appeals from jury verdicts, which review the law only. The first named exception is designed to discourage appeals in relatively inconsequential matters, and the other exception recognizes and preserves the principle that the jury is the finder of the facts and that its fact findings, when supported by sufficient evidence, are final and conclusive. The applicability of these exceptions should present no problems.

The differentiation between "controversies arising in proceedings in bankruptcy" has been retained for only one purpose, namely, to allow appeals from interlocutory judgments, decrees or orders in the series of administrative steps which constitute the bankruptcy proceeding. Obviously, it would not be feasible or advisable in such cases, to postpone the right of appeal to the date of termination of the entire bankruptcy proceeding.

This subdivision [24b] has been derived, unchanged, from subd. b of sec. 24 of the old Act, which also provided that appeals thereunder, except the appeals enumerated in subd. a of sec. 25, shall be allowed only in the discretion of the appellate court. As hereinabove indicated, this provision has been deleted, but an exception, requiring allowance, has been made with respect to appeals from matters involving $500 or over."

and again at page 249 where the author discusses Section 250:

"This provision has been derived from clause (9) of subd. c of sec. 77B which has been expanded to make clear that the appeal from the grant or refusal of allowance of compensation shall be heard summarily and without the requirement of a printed record."

JOHN GERDES, CORPORATE REORGANIZATIONS: CHANGES EFFECTED BY CHAPTER X OF THE BANKRUPTCY ACT, 52 Harvard Law Review 1 (November, 1938), where the author states at page 37:

"Appeals in reorganization proceedings continue to be governed by the bankruptcy sections but these have been radically revised.

Except as to appeals from interlocutory orders, decrees or judgments, it is no longer necessary to make the often confusing distinction between 'controversies' in the proceedings and 'proceedings.' Interlocutory as well as final orders arising in any type of 'proceeding' are appealable, but apparently appeals in 'controversies' may be taken only from final orders. The facts may now be reviewed on appeals from all types of 'proceedings,' as well as from controversies,' with the exception that only matters of law may be reviewed when the appeal is from a judgment on a verdict rendered by a jury.

Allowance of the appellate court is no longer necessary to take an appeal from any kind of a 'proceeding' or 'controversy,' unless the order, decree, or judgment involves less than $500 in amount. The separate classification of certain types of 'proceedings' and the problem of determining whether a particular 'proceeding' fitted into one or the other of two categories, has been eliminated. Only the readily determinable question of amount affects the determination whether appellate allowance of the appeal is required."

All of these men were members of the National Bankruptcy Conference who took a large part in the revision of the bankruptcy Act. It was assumed by all concerned that upon the revision of Sections 24 and 25 the question of the practice and procedure upon appeals had been definitely settled.

For this reason, the Senate Committee, in its Report, after commenting upon the revision of Sections 24 and 25, found it unnecessary to make any further comment upon Section 250 than:

> "Section 250, derived from Section 77B (c) (9), is intended to facilitate appeals from the grant or refusal of an allowance of compensation. These are to be disposed of without the necessity of a printed record."

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the decree of the Circuit Court of Appeals for the Seventh Circuit be, upon further consideration, reversed.

Respectfully submitted,

Walter A. Wade,
Benjamin Wham,
George W. Ott.
Attorneys for Petitioner.

Certificate.

We, Walter A. Wade, Benjamin Wham, and George W. Ott, hereby certify that we are attorneys and of counsel for The Dickinson Industrial Site, Inc., the petitioner in the above entitled case, and that the foregoing petition for rehearing is not presented for the purposes of delay, but is in our opinion well founded in law and proper to be filed herein.

Walter A. Wade,
Benjamin Wham,
George W. Ott.

APPENDIX.

A History of H. R. 6439 (H. R. 8046) Relating to Appeals

Before The House of Representatives.

APPENDIX.

The history of Section 24 and Section 250 in the House clearly shows that it was the intent of Section 250 to incorporate Section 24 as to "the manner" of appeal, and, in fact, Section 250 expressly so declared.

Related to Sections 24 and 250 are Sections 102 and 121, and historically they must be treated together. Section 24 is a complete revision of former Sections 24 and 25. Section 250 is derived from Section 77B(c)(9); Section 102 is derived from Section 77B(k); and Section 121 is derived from Section 77B(o). The Bill H. R. 6439, to amend and revise the bankruptcy act, was introduced in the House by Congressman Chandler on April 15, 1937. In this bill the so-called relief sections, now Chapters X to XIII, inclusive, appeared as subsections of Section 12, the old composition section. This Bill was reintroduced as H. R. 8046.

Toward the close of the hearings before the House Committee, Professor John Gerdes pointed out how cumbersome, confusing and illogical it was to place the provisions for relief in subsections under Section 12, and suggested that these subsections be made separate chapters and the paragraphs be broken up into small sections. This suggestion was adopted by the House Committee.

In the Bill, H. R. 6439, Section 24 retained the distinction between "controversies arising in bankruptcy proceedings" and "proceedings" in bankruptcy, both as to the method and scope of review, but added to the type of orders in "proceedings" in bankruptcy which could be taken as of right. However, it was further provided:

> "That where, within the time limited for taking appeals, an appeal has been taken as of right instead

of by allowance of the appellate court, the appellate court may in its discretion allow such appeal before any time before final determination with the same effect as if it had been duly allowed, when taken, by the appellate court, as the case may be."

In substantially this form, Section 24 was passed by the House (Opinion, Footnote 3). A clarifying amendment deleted the words "by the appellate court, as the case may be" at the end of the quoted provision and added: "and where, within the time limited for taking appeals, an appeal has been taken by allowance of the appellate court instead of as of right, the appellate court may in its discretion entertain and determine such appeal with the same effect as if it had been duly taken as of right."

In the Bill, H. R. 6439 (H. R. 8046) Section 12 II d. (7)[1] derived from Section 77B (c) (9)[2] was expanded (1) to

1. Section 12 II d (7) appeared in the following form:

"(7) The judge may, after hearing upon notice to all parties in interest, allow, whether or not the plan is confirmed, reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred (a) in the proceeding and in connection with the plan and the reorganization, by referees or special masters, trustees and other officers, appraisers, accountants, depositories, reorganization managers and committees, or other representatives of creditors or of stockholders, and any other parties in interest, and the counsel, attorneys or agents of any of the foregoing and of the debtor; and (b) where a petition under this subsection is filed in a pending bankruptcy proceeding, the judge shall, after hearing upon notice to all parties in interest, allow reasonable compensation for services rendered and reimbursement for proper costs and expenses incurred in such pending bankruptcy proceeding by referees, receivers, trustees and other officers, appraisers, accountants, and any other parties entitled to compensation in such proceeding, including counsel and attorneys for any of the foregoing and of the debtor, and such compensation shall not be limited by the provisions of sections 40 and 48 of this Act. Appeals in matter of law and fact from orders making or refusing to make any such allowances may, in the manner and within the time prescribed for appeals by this Act, be taken to and allowed by the circuit court of appeals for the circuit in which the proceeding under this subsection is pending, independently of other appeals in the proceeding, and shall be summarily heard upon the original papers.

2. Section 77B (c) (9) is as follows: "Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him . . . (9) may allow a reasonable compensation for the services rendered and reimbursement for the actual and necessary expense incurred in connection with the proceeding and the plan by officers, parties in interest, depositaries, reorganization managers and committees or other representatives

authorize compensation to be paid although no plan was confirmed, and (2) to broaden the scope of review on appeal from compensation orders to include a review of the facts as well as the law. The last sentence read:

> "Appeals in matters of law and fact from orders making or refusing to make any such allowances made, in the manner and within the time prescribed for appeals by this Act, be taken to and allowed by the circuit court of appeals for the circuit in which the proceeding in this sub-section is pending, independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

With some revisions, Section 12 II d.(7) was broken up and became Sections 241 to 250, inclusive.

Under Section 24, as passed by the House, appeals from compensation orders were required to be allowed by the appellate courts but it was further provided that "where, within the time limited for taking appeals, an appeal has been taken as of right instead of by allowance of the appellate court, the appellate court may in its discretion allow such appeal at any time before final determination with the same effect as if it had been duly allowed when taken". A thorough and painstaking examination of the hearings before the congressional committees on H. R. 6439 (H. R. 8046) fails to disclose any comment whatsoever upon the words "taken to and allowed by". It seems reasonable to assume, however, in view of the provision of Section 24, that these words were used to include appeals that had been erroneously taken to the appellate court "within the time limited for taking appeals". The language of Section 250 that appeals "may, in the manner and within the time provided for appeals by

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of creditors or stockholders, and the attorneys or agents of any of the foregoing and of the debtor, but appeals from orders fixing such allowances may be taken to the Circuit Court of Appeals independently of their appeals in the proceeding and shall be held summarily."

this Act, be taken to and allowed by circuit court of appeals", suggests this connection. This is further borne out by the fact that the words in Section 250 "taken to and allowed by" the appellate court are not synonymous with the words "taken by allowance of the appellate court" as used in Section 24. The House Committee was thoroughly familiar with the distinction between appeals "taken as of right" and "appeals by allowance of the appellate court".[3]

The dependence of Section 12 II d. (7) on Section 24 is further emphasized by the relationship of these sections in H. R. 6439 (H. R. 8046) to Section II f. (1) and Section 12 II a. (1).

Section 12 II f. (1),[4] derived from Section 77B (o),[5] provided that where not inconsistent with the provisions of subdivision II of Section 12, the jurisdiction of the appellate courts shall be the same as in bankruptcy proceedings. Section 12 II f.(1), with some revision, was broken

3. H. R. Hearings on H. R. 6439 (H. R. 8046) 75th Cong., 1st Sess., pp. 78-80, 214-218, 223-224, 240-241, 405-406.

4. Section 12 II f. (1) appeared in the following form:
"JURISDICTION, POWERS, DUTIES, RIGHTS, AND TITLE.—(1) In a proceeding under this subsection (a) the court in which the petition is filed shall have exclusive jurisdiction of the debtor and its property, wherever located, and (b) where not inconsistent with the provisions of this subsection, the jurisdiction, powers, and duties of the court, the title, powers, and duties of its officers, the rights, privileges, and duties of the debtor, the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor, and the jurisdiction of appellate courts, shall, before the approval of the petitioner, be the same as in a bankruptcy proceeding before adjudication, and, upon the approval of the petition, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered, where a bankruptcy proceeding is pending, on the day when the voluntary or involuntary petition in bankruptcy was filed, otherwise on the day when the petition under this subsection was filed."

5. Section 77B(o) is as follows: "(o) In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition or answer was approved."

up and became Sections 111, 112, 114 and 121. Section 121 of the present Act provides as follows:

> "Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding."

Section 12 II a. (1),[6] derived from Section 77B(k),[7] after making certain enumerated exceptions not material here, provided:

> "All other provisions of this Act, not inconsistent with the provisions of this subsection, shall apply in a proceeding under this subsection."

The language of sections 24, 102, 121, and 250 (derived from sections 24, 77B(k), 77B(o), and 77B(c), (9), respectively) had been construed in *Shulman* v. *Wilson-Sheri-*

6. Section 12 II a.(1) appeared as follows: "a. APPLICATION; DEFINITIONS.—(1) The provisions of this subsection shall apply exclusively to proceedings under this subsection. Unless and until an order is entered directing that bankruptcy be proceeded with, sections 22, 40, 44, 48, and 55, subdivisions a, b, d, e, h, i, and n of section 57, sections 58, 63, 64 and 65, and subdivisions b, f, g, h, and i of section 70 of this Act shall not apply in a proceeding under this subsection; all other provisions of this Act, not inconsistent with the provisions of this subsection, shall apply in a proceeding under this subsection."

7. Section 77B(k) is as follows: "(k) If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: (1) The case may be referred to a referee as provided in section 22, who shall be compensated as provided in section 40; (2) the first meeting of creditors shall be held as provided in section 55, upon notice as provided in section 58; (3) a trustee or trustees shall be appoined as provided in section 44, and be compensated as provided in section 48; (4) claims which are provable under section 63 may be proved as provided in section 57, except that the time within which proof may be made shall not expire until six months after the date of the last publication of the notice of the first meeting; (5) debts shall be entitled to priority as provided in section 64; (6) sales shall be made as provided in subdivision (b) of section 70; (7) dividends may be declared and paid as provided in section 65. None of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j), and (m) of section 57, and subdivisions (a) and (e) of section 70, shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate. All other provisions of this Act, except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors'; 'bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequences and effect as an order of adjudication."

dan Hotel Co., 301 U. S. 172; *O'Connor* v. *Mills*, 300 U. S. 26; *Meyer* v. *Kenmore Hotel Company*, 297 U. S. 160; *Ice* v. *United Exchange Building*, 88 F. (2d) 372; *In re Wilson-Sheridan Hotel Co.*, 86 F. (2d) 98; *In re New York Investors*, 79 F. (2d) 179; *In re Grocery Center*, 91 F. (2d) 76. In these cases it was held that sections 77B (k) made sections 24 and 25 applicable to proceedings under Section 77B and that appeals from orders in reorganization proceedings were authorized to be taken only as provided for by section 24.

In *Shulman* v. *Wilson-Sheridan Hotel Co.*, 301 U. S. 172, this Court held it was not inconsistent with section 77B (c)(9) to require appeals to be taken in the manner provided by section 24. It must be assumed that the House in substantially re-enacting these provisions of section 77B intended that they would receive the same construction.

The House Committee Report that accompanied H. R. 6439 (H. R. 8046) made the following comments with respect to the provisions relating to appeals, at page 22:

> "(d) *Practice on appeals.*
>
> Sections 24 and 25: Sections 24 and 25 of the present act relate to appellate jurisdiction and should be considered together. Section 24 (a) confers such jurisdiction over 'controversies arising in bankruptcy proceedings', in both law and fact, if the proceeding is essentially equitable, and in law only as by a writ of error, if the proceeding is one at law. Section 25 (a) allows appeals 'as in equity cases, in bankruptcy proceedings' in the three instances specified. Section 24 (b), which restricts the review to matters of law only, is intended to include all other proceedings in bankruptcy. In both sections provision is made that all reviews therein provided shall be in the form of an appeal; the time is fixed for taking the appeal, and the reviews under section 24 (b) are allowable only in the discretion of the appellate court.
>
> The order of the provisions is illogical and confus-

ing. The bill has rewritten the sections by bringing under section 24 all the provisions dealing with appellate jurisdiction and under section 25 those dealing with practice on appeals.

Appeals as of right are extended to include the confirmation or refusal to confirm a plan of reorganization and an appeal from a turnover order.

Subdivision b of section 24 is expanded in order to overcome the existing hardships which result from the failure to take an appeal in proper form. The amendment provides that the appellate court may in its discretion permit an amendment of the appellate record either in the case of an appeal taken as of right where it should have been taken by allowance or by allowance when it should have been taken as of right.

The distinction between appeals as of right and by allowance and the distinction between controversies arising in a bankruptcy proceeding and proceedings in bankruptcy, upon which the former is predicated, are of necessity retained. To eliminate these distinctions would result in putting upon appellate courts the burden of hearing appeals from administrative steps in a proceeding, and what is much more objectionable the slowing up of the administration of an estate."

And the following comment in respect of Section 250, at page 46:

"Appeals may be taken on allowances made or on refusal to make allowances. Such appeals may be independently taken and shall be summarily heard upon the original papers."

SUPREME COURT OF THE UNITED STATES.

No. 386.—October Term, 1939.

The Dickinson Industrial Site, Inc., a Corporation, formerly The Albert Dickinson Company, Petitioner, *vs.* Percy Cowan, Edgar N. Greenebaum, Walter A. Wade, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[March 11, 1940.]

Mr. Justice Douglas delivered the opinion of the Court.

A plan of reorganization of petitioner under § 77B of the Bankruptcy Act (48 Stat. 912) was confirmed on February 23, 1938. Respondents are members of a bondholders' committee who sought an allowance in those proceedings. On October 26, 1938, they were awarded $2,000 for services rendered, $20,000 having been asked. On November 25, 1938, they petitioned the Circuit Court of Appeals for leave to appeal from that order. The appeal was allowed. Petitioner moved to dismiss the appeal on the ground that the Court of Appeals had no jurisdiction to allow it, the argument being that respondent had an appeal as of right which could only be taken by filing a notice of appeal in the District Court. The Circuit Court of Appeals denied petitioner's motion to dismiss and modified the order by increasing the allowance to $10,000. 104 F. (2d) 771. We granted certiorari because of a conflict of that ruling with *London* v. *O'Dougherty*, 102 F. (2d) 524, which held that appeals from compensation orders involving $500 or more could be had as a matter of right under the Chandler Act (52 Stat. 840).

First. The Circuit Court of Appeals held that the provisions of the Chandler Act, which became effective on September 22, 1938 (§ 7), were applicable to this appeal. We think that follows from § 6(b) of the Act which states that "Except as otherwise provided in this amendatory Act, the provisions of this amendatory Act shall govern proceedings so far as practicable in cases pending when it takes effect; . . ." Where, as here, appeal is taken after the

effective date of the Act, it is clearly "practicable" to apply the new appeal provisions. Contrary to respondents' contention, § 276(e)(2) is not applicable to appeals. It provides that the provisions of Ch. X (the successor to § 77B) shall apply to pending proceedings "to the extent that the judge shall deem their application practicable" where the petition in such proceedings was approved more than three months before the effective date of the amendatory Act. But that relates solely to proceedings in the district court. The "judge" referred to in that section means a "judge of a court of bankruptcy". § 1(20). Such court does not include the Circuit Court of Appeals. § 1(10). Hence the application of the new appeal provisions to this type of case is not dependent on a determination of practicability by the district judge under § 276(c)(2).

Second. Petitioner's argument that the appeal in this case could be taken as a matter of right requires an analysis of § 24 and § 250 of the Chandler Act. Sec. 24 provides in part:

"a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, however,* That the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only: *Provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate court.

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

Sec. 250 provides:

"Appeals may be taken in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement, and may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

Petitioner contends that Congress by § 24 created a single test—the amount of the order appealed from—for determining whether leave to appeal was necessary and that the words "allowed by" in § 250 refer to appeals from orders of allowances of less than $500.

Our view, however, is that appeals from all orders making or refusing to make allowances of compensation or reimbursement under Ch. X of the Chandler Act may be had only at the discretion of the Circuit Court of Appeals.

Under § 77B(c)(9) it was provided that "appeals from orders fixing such allowances may be *taken to* the Circuit Court of Appeals independently of other appeals in the proceeding and shall be heard summarily." And it was held by this Court in *Shulman v. Wilson-Sheridan Hotel Co.*, 301 U. S. 172, that those appeals could not be had as a matter of right but only in the discretion of the appellate court as provided in former § 24(b). That was the way the matter stood when § 250 was drafted. The history of that section[1] shows that it was derived from § 77B(c)(9). But, significantly, the words "*and allowed by*" were added—words not present in § 77B(c)(9). The result plainly was (1) to carry over into the new act the rule of *Shulman v. Wilson-Sheridan Hotel Co., supra,* and (2) to set apart in a separate section the provisions for appeals from that type of order so as to make those appeals no longer dependent on § 24, which had become a storm center for the revisionists.[2] If the House did not intend the latter result, then the addition of the words "and allowed by" were wholly needless, as under the House revision of § 24 appeals from compensation orders would have been discretionary with the appellate court.[3]

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[1] S. Rep. No. 1916, 75th Cong., 3rd Sess., p. 38.

[2] H. R. Hearings on H. R. 6439 (H. R. 8046), 75th Cong., 1st Sess., pp. 79-80, 213-218, 222-223, 240-241, 405-406; S. Hearings on H. R. 8046, 75th Cong., 2nd Sess., pp. 53-54, 60, 103-108. And see H. R. Rep. No. 1409, 75th Cong., 1st Sess., p. 22.

[3] This is made clear by comparison of § 250 with § 24 as they passed the House.

Sec. 250 then read:

"Appeals in matters of law or fact from orders making or refusing to make allowances of compensation or reimbursement may, in the manner and within the time provided for appeals by this Act, be taken to and allowed by the circuit court of appeals independently of other appeals in the proceeding, and shall be summarily heard upon the original papers."

Sec. 24 a and b then read:

"a. The Circuit Courts of Appeals of the United States and the United States Court of Appeals of the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions (1) of controversies arising in the course of proceedings under this Act in the same manner and to the same extent as in suits at law or in equity; (2) to superintend and revise, in matter of law and fact, the proceedings of such inferior courts of bankruptcy in the following

Hence under the House Bill as it reached the Senate, it seems clear that no such appeals could be had as a matter of right. In the Senate the present § 24 was substituted for the House provision; but the present § 250 was not altered in any respect material here. It is clear from the Senate hearings and Commitee Report that the Senate was interested only in the elimination from § 24 of the old distinctions between "controversies arising in bankruptcy proceedings" and "proceedings" in bankruptcy. There was not the slightest intimation of any dissatisfaction with the rule of *Shulman* v. *Wilson-Sheridan Hotel Co., supra,* or with § 250 as it

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cases: (a) A judgment adjudging or refusing to adjudge a person a bankrupt; (b) a judgment approving or dismissing a petition filed by or against a debtor under chapter X of this Act; (c) a judgment granting or denying a discharge; (d) a judgment confirming or refusing to confirm an arrangement or plan; (e) a judgment allowing or rejecting a debt, claim, or interest of $500 or over; and (f) a judgment allowing or dismissing an application for an order upon a bankrupt or other person to deliver or turn over property to the marshal, or to the receiver or trustee of the estate; and (3) to superintend and revise, in matter of law only, the proceedings in all other cases of such inferior courts of bankruptcy.

"b. Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal: *Provided,* That in the cases specified in subdivision a (3) of this section, such appeals shall be allowed in the discretion of the appellate court: *And provided further,* That where, within the time limited for taking appeals, an appeal has been taken as of right instead of by allowance of the appellate court, the appellate court may in its discretion allow such appeal at any time before final determination with the same effect as if it had been duly allowed, when taken, and where, within the time limited for taking appeals, an appeal has been taken by allowance of the appellate court instead of as of right, the appellate court may in its discretion entertain and determine such appeal with the same effect as if it had been duly taken as of right."

S. Rep., *supra* note 1, p. 4, commented as follows on the present § 24:

"The House bill makes certain amendments in the sections of the act (24-25) relative to appeals, but preserves the existing distinction between appeals as of right and appeals by leave of the appellate courts. The amendment presented by the committee practically abolishes this distinction. Under it, appeals may be made as of right in all cases involving $500 or more. In controversies of less than this amount, appeals may be taken only upon allowance by the appellate court. The jurisdiction of the appellate court will extend both to matters of law and of fact, except that in an appeal from a judgment on a verdict rendered by a jury the jurisdiction will extend to matters of law only. The removal of the troublesome distinction will be a service to both bench and bar. It is often difficult to determine the proper procedure under the present law and frequently appeals are taken in both ways in order to be certain. The House bill seeks to remedy this condition by providing that in the event of mistake the appellate court may consider the appeal as properly taken and proceed to a determination of the case. Your committee believes it is much better to eliminate the distinction altogether."

The testimony of Reuben G. Hunt before the Senate Committee is particularly illuminating on this point of controversy. S. Hearings, *supra,* note 2, p. 53. See also Hunt, Appeals from the District Courts to the Circuit Courts of Appeals in Bankruptcy Cases, 42 Comm. L. Journ. (1937).

passed the House. To be sure, the Senate Committee Report is somewhat ambiguous.[5] But it is perhaps significant that that report in commenting on § 24 stated not that it "abolished" but that it "practically abolished" the distinction between appeals as of right and appeals by leave of the appellate courts.

More important, however, is the matter of statutory construction. To hold that an appeal from a compensation order is governed by § 24 the words "taken to *and* allowed by" in § 250 must be read "taken to *or* allowed by". Only then can appeals from compensation orders involving less than $500 be governed by "allowed by" and appeals from all other such orders be governed by "taken to". In the face of the foregoing history we do not believe we are justified in substituting "or" for "and". The inappropriateness of it is somewhat emphasized by the history of *"taken to"* which in *Shulman* v. *Wilson-Sheridan Hotel Co., supra,* was held not to permit an appeal as of right. It is further emphasized by considerations of policy.

The history of fees in corporate reorganizations contains many sordid chapters. One of the purposes of § 77B was to place those fees under more effective control.[6] Buttressing that control was § 77B(c)(9) which, together with former § 24(b), made appeals from compensation orders discretionary with the appellate court. We should not depart from that policy in absence of a clear expression from Congress of its desire for a change. Fee claimants are either officers of the court or fiduciaries,[7] such as members of committees, whose claims for allowance from the estate are based only on service rendered to and benefits received by the estate.[8] Allowance or disallowance involves an exercise of sound discretion

[5] That report states that the present § 24 "practically abolishes" the distinction "between appeals as of right and appeals by leave of the appellate courts." *Id., supra,* note 4. And the Committee in commenting on § 250 merely says:

"Section 250, derived from section 77B(c)(9), is intended to facilitate appeals from the grant or refusal of an allowance of compensation. These are to be disposed of without the necessity of a printed record." *Id.,* p. 38.

[6] H. R. Rep No. 194, 73rd Cong., 1st Sess., p. 1.

[7] The fiduciary status of such claimants is expressly recognized in the Chandler Act. Sec. 249 provides in part:

"No compensation or reimbursement shall be allowed to any committee or attorney, or other person acting in the proceedings in a representative or fiduciary capacity, who at any time after assuming to act in such capacity has purchased or sold such claims or stock, or by whom or for whose account such claims or stock have, without the prior consent or subsequent approval of the judge, been otherwise acquired or transferred."

[8] Sec. 243.

by the court based on that statutory standard. Unlike appeals from other orders, appeals from compensation orders therefore normally involve only one question of law — abuse of discretion. These factors not only emphasize the appropriateness of the separate treatment by Congress of appeals from compensation orders; they reinforce the interpretation of § 250 which restricts these appeals. For certainly it seems sound policy to require fiduciaries to make out a *prima facie* case of inequitable treatment in order to be heard before the appellate court. To allow these appeals as a matter of right is to encourage an unseemly parade to the appellate courts and to add to the time and expense of administration. We will not resolve any ambiguities in favor of that alternative.

Whether or not the Circuit Court of Appeals erred in modifying the order so as to grant respondents an increased allowance was not raised in the petition for certiorari and hence has not been considered here. *Helis* v. *Ward*, 308 U. S. 365.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.